ADMINISTRATIVE LAW BULLETIN

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ADMINISTRATIVE LAW SECTION

AMERICAN BAR ASSOCIATION

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CHAIRMAN'S PAGE

The time has come when the Section of Administrative Law should take stock of where it stands in the accomplishment of the great objective set for it when it was established by the American Bar Association and chart its future course.

Prior to the annual meeting of the American Bar Association in 1945, the Special Committee on Administrative Law, headed by Carl McFarland as Chairman and having among its members Reuben Hall, Ralph M. Hoyt, W. James MacIntosh and Sylvester C. Smith, Jr. (now Chairman of the House of Delegates), submitted its report recommending continued support by all the members of the Association of the then pending Administrative Procedure Act and urging the establishment of this Section.

The Report of the Special Committee (70 A.B.A. 272) said:

> "In supporting this legislation the Association has avoided seeking too much too soon. If it passes, a beginning will have been made—but only a beginning. * * * The legislation which may be secured could be wasted in large part by the failure of the Association to make provision for adequate follow-up. * * * It will be necessary to follow carefully the operation of "any Procedure Act which Congress may pass. This will involve the taking of measures to prevent subsequent emasculation of the Statute or to secure amendments which time and experience may show to be desirable. * * * Beyond all else, however, the Administrative system must not be permitted to supply an aura of due process and procedural regularity for what are essentially arbitrary and dictatorial methods of government."

In 1950 the House of Delegates after restating the substance of the resolutions that it had adopted in 1944 and 1945 outlined further the responsibilities and the scope of action of the Section:

> *"Be It Resolved,* That the House of Delegates reaffirms those resolutions and directs that the Section of Administrative Law as the successor of the prior Special Committee on Administrative Law, by all necessary and proper means, including appearances before legislative committees
>
> (1) preserve the gains made by the adoption of the Administrative Procedure Act as the law of the land,

(2) develop and seek the adoption of improvements thereof as well as additional measures to like purposes, and
(3) procure the assistance of officers, units and members of the Association as well as the cooperation of state and local bar associations; . . ."

Under this general authority and directive and in implementation of specific resolutions too numerous to mention passed by the House of Delegates, the Section has been working for almost fifteen years. It has grown in membership. It now has twenty-eight committees instead of the nine established in 1946.

What have been the accomplishments? Where do we stand today? To many of us, as well as others outside the Section, the movement toward the attainment of the goal set has appeared to be not only laborious but exceedingly slow. Futhermore, we recognize that in this interim period powerful forces have been aligned with us whose efforts have been to the same end, *i.e.*, the Special Ad Hoc Committees appointed by the Board of Governors of the Association; the President's Conference on Administrative Procedure; the Task Force on Legal Services and Procedures of the Hoover Commissions and various Congressional Committees conducting investigations and studies of federal administrative practices and procedures. In the meantime the scope of administrative power and authority has grown tremendously. Its breadth and reach is almost fantastic.

After lengthy discussion and careful consideration by members of the Section, drafts of a new Federal Administrative Code, a Federal Administrative Practice Act, and a statutory code of Standards of Agency Conduct are now being studied by Congressional Committees. The legislative approach to the goal established is, however, but a part—perhaps the smaller part—of the responsibility placed upon the Section. The duty to protect the gains made by the enactment of the Administrative Procedure Act can be fulfilled in many instances more directly by voluntary action of the federal agencies themselves. It is in this field that, up to date, the greatest accomplishments of the Section have occurred. Admittedly there is a great deal that still remains to be done by the administrative agencies themselves. There have been deviations. This is disclosed from time to time in this Bulletin and in our Committee Reports. It is abundantly disclosed by the agency responses to the questionnaire submitted to them by the

Committee on Government Operations of the House of Representatives and reported in the Survey and Study of Administrative Organization Procedure and Practice of the Federal Agencies printed for the use of that Committee. But as a whole federal administrative practice and procedure has been much improved over the years.

To demonstrate this it is interesting to go back for almost another decade prior to the enactment of the Administrative Procedure Act in 1946. Since then the psychological atmosphere surrounding the subject has entirely changed. In 1935 the Supreme Court rendered its decision in the first Morgan case, often referred to as a "landmark case" in the development of administrative law in our country. In that case, the Supreme Court held that, although it was reviewing a proceeding looking to legislative action in the fixing of rates, this was also a proceeding which by virtue of the authority conferred had special attributes. For Congress required the Secretary of Agriculture first to determine, as a condition of his action, that the existing rates were "unjust, unreasonable or discriminatory." This the court decided was adjudicatory in character and imposed a duty which carried with it fundamental procedural requirements.

There must be a "full hearing" and the Court said:

> "The requirement of a 'full hearing' has obvious reference to judicial proceedings in which evidence is received and weighed by the trier of the facts." (Morgan v. United States, 298 U.S. 479, 80 L. Ed. 1294, 1295).

Shortly after the first opinion was handed down many of the personnel of the Federal Administrative Agencies became greatly alarmed. The protagonists of the administrative system of adjudication jumped to the conclusion that the efficiency of the federal administrative process would be seriously impaired by the requirement of "due process." A meeting of those holding this viewpoint was held in Washington, D. C. Approximately 1,500 attended that meeting to protest vehemently against the decision. But the decision stood and was further elaborated and strengthened on a second appeal. In the two opinions the court set forth the basic requirements of "due process" in such a proceeding.

More important, however, than the content of this decision which has since set the pattern for "due process" in administrative adjudicatory or quasi-judicial proceedings, is the fact that the

fears of the administrative agencies as to the consequences of requiring "due process" has by subsequent events proved to be wholly unjustified. The agencies, and there are many of them, which have substantially complied have found that, properly implemented, "due process" is a more orderly, practical and expeditious process than rule by uncontrolled discretion.

In the early days the enthusiastic and Utopian exponents of administrative government—of what really amounted to a new departure in government—brushed Congress aside with the assertion that it was unable to deal with the legislative details involved in meeting the ever-new and complex problems of an industrial society. They also brushed the courts aside with the statement that court rules of procedure were archaic and that the established rules of evidence impeded rather than promoted effective administration. Time and experience have made clear, however, that the Lockean principle of separation of powers, which is embodied in our Constitution, has much of practical merit to support it as well as being the cornerstone upon which the protections against dictatorship and tyranny must rest.

It required ten years of effort, during which the Attorney General's Committee on Administrative Procedure and the Special Committee on Administrative Law of the American Bar Association studied and reported on administrative problems, to formulate and secure the enactment of the Administrative Procedure Act. As pointed out, more than another decade has now passed and we are on the threshold of a complete Congressional review of agency practices, procedures and standards of conduct. Progress does take time. But when we recall it took eighty years after one of the clauses of Magna Carta in 1215 provided that the courts of England should no longer be mere camp followers of the Crown to create a professional bar and judiciary and it required almost two centuries really to establish equity jurisdiction in the courts of England, perhaps we are too impatient.

I believe the Section should take much encouragement from what has been accomplished agency-wise largely as the result of its activities and constant interest. Reference might be had to what is occurring and what has recently occurred in two of the more important but typical federal agencies.

In July 1958 the Securities and Exchange Commission adopted a very comprehensive Code of Ethics for its members setting up standards applicable not alone to their judicial responsibilities

but also to their executive and legislative activities. Our committee on the Code of Agency Standards of Conduct highly commended the Commission for the improvement that it made in the regulations previously existing. The Commission has been continuously reviewing and improving its rules of practice. After the report of the President's Conference on Administrative Procedure in 1953 it commenced to experiment with the pre-hearing conference as recommended by the President of the Conference. In April of 1955, in an amendment to its rules, it stressed the desirability that parties to a proceeding work out procedures with the designated hearing examiner prior to the hearing where there was any question as to the applicability of the general rules.

Last year the Commission retained the services of two law professors as consultants to help its staff in a further study of its rules and regulations affecting practice, looking toward revisions which would facilitate the conduct of its proceedings and further clarify the procedures to be followed. It has attempted to publish its rules as recommended by the President's Conference in a manner which would conform to the style used in the Code of Federal Regulations so that the practitioners before the commission can utilize the uniform system of citation based on the code. In 1956 it released a summary of all the categories of information in its files indicating which were of such a nature that anyone dealing with the Commission could have access to them and which categories were considered to be for the use of the Commission only.

In recent years the Commission has been making strenuous efforts with considerable success to simplify the forms it uses. More important perhaps than all of this is the fact that the Commission is cooperating not only with committees of the American Bar Association but with representatives of State and local bar associations and of the Federal Bar Association. The last Bulletin of this Section bears witness to the helpful character of the participation by the Commission's Chairman and members of the first Institute on Administrative Procedure of the Section held in Washington last November.

The Federal Trade Commission has in recent years improved its practices and procedures along the lines set out and recommended by this Section. Its general procedures, its rule-making procedures, its adjudicatory rules and the statutes under which it operates have been collated in a single document to which the public has access. It has given serious consideration to the recommendations

in the report of the President's Conference on Administrative Procedure.

The Federal Bar Association and a sub-committee of ABA's Section of Anti-Trust Law have been active in this work. Particular improvement has been made recently in strengthening the authority of hearing examiners. Under a new rule the initial decision of the hearing examiner becomes the decision of the Commission unless an appeal is taken or the Commission otherwise stays the decision. This Section—as well as other groups which have studied the situation—has always placed the greatest emphasis on providing for the independence of the hearing officer and expanding his authority and powers as a trial judge.

The Federal Trade Commission and the Securities and Exchange Commission are especially mentioned, not because their attitude and accomplishment in the right direction are more significant than that of other important agencies, but because they illustrate what is going on. The statements made by Chairmen, members and counsel for other federal agencies and reported in the last Administrative Law Bulletin demonstrate this as well as set forth for the practitioner the latest information on how he may handle effectively his client's business before these agencies. Their statements bring out some of the difficult problems which confront the agencies in discharging their responsibilities.

I do not want to be misunderstood. There are still many of the over 100 federal regulatory agencies which have not emerged from the darkness and arbitrariness of a closed-mind bureaucratic attitude. They are unwilling to give fair consideration to the new methods and procedures whereby not only their work may be carried on more efficiently but the confidence of the public and of Congress in their operations may be restored and enhanced.

Much information on this general subject can be gained by reading the reports of the agency committees contained in this Bulletin and by reviewing the statements of agency Chairmen, Members and Counsel in the last Bulletin. We can learn there about the new methods: the use of the informal conference to resolve controversies prior to complaint or the commencement of actual proceedings; the importance of the pre-hearing conference after complaint to simplify and often dispose of many of the issues before a hearing so that full attention may be given those issues genuinely in dispute and needless protraction of the proceedings avoided; the granting to the hearing officers of authority to rule

on amendments to complaints without reference to the agency members, permit or deny intervention by other parties, and rule on all matters of evidence with reasonable assurance of support by the agency; the strengthening of the status of the hearing examiner, particularly as to factual determinations; improved methods as to the disclosure of information and of notice to interested parties; the confinement of the determinations made to the record evidence; the making of specific rulings on findings of fact requested by the parties to the proceeding, with appropriate statements relative to the evidence upon which such rulings are based. These represent methods which in many situations can be employed to the benefit of all concerned.

Fundamental, of course, is the maintenance and betterment of the quality and competence of the hearing officers. This, of course, involves the methods of selection used in connection with appointment, and also tenure, promotion, compensation and status which have been recommended by this Section and the groups to which I have previously referred. If we are to have efficiency and at the same time fairness in these proceedings, the highest standard of competence and integrity of hearing officers must be maintained.

In conclusion I not only suggest to our membership attendance at the annual meeting where many of these problems will be discussed but also the careful, painstaking consideration of the committee reports and other information set forth in the Bulletin.

I am fully cognizant of the demands of the day which rest so heavily upon the practicing lawyer and how difficult it is to find time to read and study and become familiar with matters which are not under some closely approaching deadline. Here, however, is a vast and vitally important area in which the law is developing and where we must and should play an effective part in that development. More and more our future practice will lie in that direction. I trust that the membership—this section being the central agency of the ABA having responsibility as to the basic subject-matter—will keep contact with the legislation now pending in Congress and the amendments that will be from time to time proposed before it is enacted.

We should not be deterred by the fact that the very breadth and scope of the problem with its many complexities and divergencies makes what appears to be unnecessary delay in accomplishment inevitable. Much has been done. As a result of our past efforts the opportunity for great advances is directly ahead. All is within

the objective as set forth for the Section by the Association and is also in the highest public interest. The leader of the English Bar and Judiciary told the American Bar Association in 1953 that here lies the great problem which must be solved correctly both in England and America if the confidence and the interest of the people in their democratic form of government is to be retained. We agree and, although it requires great effort—involving compromise and tolerance—and the adjustment from time to time of our own ideas to the practical necessities of immediate situations, we must attain, step by step, our goal.

JOHN B. GAGE, *Chairman*

PROGRAM FOR ANNUAL MEETING

SECTION OF ADMINISTRATIVE LAW

JOHN B. GAGE, *Chairman,* Kansas City, Mo.
COUNTS JOHNSON, Tampa, Florida
Chairman, Annual Meeting Committee

Saturday, August 22

(Heather Room, The Balmoral)

12:30 P.M.—Luncheon Meeting of Council and Committee Chairmen

Saturday, August 22

(Heather Room, The Balmoral)

2:00 P.M.—Meeting of Council and Committee Chairmen

Sunday, August 23

(Heather Room, The Balmoral)

10:00 A.M.—Meeting of Council and Committee Chairmen
2:00 P.M.—Meeting of Council and Committee Chairmen

Monday, August 24

(Heather Room, The Balmoral)

GENERAL SESSION (2:00 to 5:00 P.M.)
2:00 to 2:15 P.M.—Report of the Nominating Committee
FORUM (2:15 to 5:00 P.M.)—Subject: HOW CAN UNDUE AND UNNECESSARY DELAY IN ADMINISTRATIVE PROCEEDINGS BE ELIMINATED
2:15 to 3:15 P.M.—SPEAKERS:

Introductory Remarks—Hon. Dante B. Fascell, Member of Congress from Fourth District of Florida

Role of Hearing Examiner in Agency Proceedings—Harold L. Russell, Former Chairman Administrative Law Section, Atlanta, Georgia

Discovery, Pleadings and Stipulations—Raoul Berger, Chairman of Agency Rule Making Committee, Section of Administrative Law, Washington, D. C.

Use of Pre-trial—Bernard J. Gallagher, Chairman of National Committee, Administrative Law Section, Washington, D. C.

Role of Agency on Review—Donald C. Beelar, Immediate Past Chairman Administrative Law Section, Washington, D. C.

3:15 to 5:00 P.M.—Panel Discussion—Other Aspects and Possible Solutions of Problems Incident to Unnecessary Delays

Moderator—Cody Fowler, Former President American Bar Association, Tampa, Florida

Panel Members:

Hon. William R. Connole, Member of Federal Power Commission, Washington, D. C.

J. Earl Cox, Vice Chairman of Committee on Hearing Examiners, Section of Administrative Law, Washington, D. C.

John F. Cushman, Director, Office of Administrative Procedure, Department of Justice, Washington, D. C.

Robert W. Ginnane, General Counsel, Interstate Commerce Commission, Washington, D. C.

Thomas G. Meeker, General Counsel, Securities and Exchange Commission, Washington, D. C.

G. Roger Nelson, Chairman of Securities Committee, Section of Administrative Law, Washington, D. C.

Victor G. Rosenblum, Professor, Northwestern University, Evanston, Illinois

Hon. Edward T. Tait, Member of Federal Trade Commission, Washington, D. C.

Questions from Floor

Tuesday, August 25

(Heather Room, The Balmoral)

General Session

10:00 A.M. to 12:00 Noon—Committee Reports and Recommendations

Tuesday, August 25

(Heather Room, The Balmoral)

General Session

2:00 to 2:45 P.M.—Address: Speaker to be Announced

2:45 to 4:30 P.M.—Committee Reports and Recommendations

4:30 to 5:00 P.M.—Election of Officers and Council Members

6:30 P.M.—Reception and Buffet Dinner (Patio and Beach, The Balmoral)

FEDERAL AGENCY DECISIONS—1958

LEO ALBERT HUARD *

Soon after the close of the 1958 annual meeting, the newly appointed editorial board of this journal met to formulate policy and lay plans for the coming year. Giddy with the heady sense of power which so often comes to those recently raised from peonage, the new board decided that administrative law writings placed insufficient emphasis upon the work product of the hearing examiners and the agencies. It was a short jump from this decision to the conclusion that the proper vehicle to cure this defect was the Administrative Law Bulletin. It then became necessary to choose an author to whom the task could be delegated. The Board entered upon a careful process of selection involving evaluation of the experience and literary attainments of various candidates. The selectee (author of these pages) was somehow found to possess the requisite qualifications. He also held the shortest straw!

The Board's decision to report upon agency matters seemed a sensible one when it was made. Treatises, textbooks and law review articles on administrative law, only infrequently treat of examiners' decisions and agency rules and opinions. When such materials can be found at all in the sourcebooks, they are usually presented indirectly as a by-product of the analysis of a Supreme Court or Court of Appeals review of particular administrative action. Yet the daily practice of administrative law certainly involves the study and the use of precedents set by the administrators themselves. Prior administrative decisions and agency rules established at some earlier date are often useful in resolving today's problems. Administrative *stare decisis* is frequently dispositive of quasi-legislative as well as quasi-judicial matters. It was our thought that an analysis of these materials, not for one agency alone, but "across-the-board" should give a valuable picture of administrative law in action. At an optimistic best, this picture should provide a more accurate representation of the actuality of administra-

* Professor of Law, Director, The Nuclear-Space Law Institute, Georgetown University Law Center, Washington 1, D. C.

tive law than any analysis of the relatively few administrative law cases reviewed by the Supreme Court and the Courts of Appeals.

Our plans initially called for a survey of significant agency decisions during 1958. The newness of the idea and the uncertainty of its reception led us to eliminate consideration of current agency rule-making. We felt that if this modest effort met with approval, we could expand our inquiry to include the very important area of rule-making at some later date. The easiest and surest way of isolating the "significant" from the mass of decisions seemed to be to quiz government counsel and private practitioners before the several agencies. If they could not identify the important agency decisions, no one could! The author, therefore, sought out several such persons whose professional activities involved five or six major agencies. They were all enthusiastic about this project. It was, they said, "long overdue," "very important," "a vital necessity," *ad infinitum, ad nauseam.* They would be delighted to furnish case citations within their respective agencies! After a long, lonely and fruitless vigil at the mailbox, we have reluctantly concluded that nothing of importance was decided during 1958 in any administrative agency with the single exception of the Federal Communications Commission. And in that agency, the only important matters apparently were the "influence" cases unearthed by the House Special Subcommittee on Legislative Oversight. So speaks the response of the administrative law bar!

The immediate effect of this disappointing performance by those who should know most about agency procedures and processes was to drop the word "significant" from the proposed title of this article. Another effect, since we do not easily abandon an idea once acquired was to throw us upon our own resources and the many, widely scattered collections of agency decisions. The result, after examining many decisions from virtually all agencies and departments, is this report of a number of such decisions. Unfortunately, they have only one thing to recommend them—they have aroused the author's interest and curiosity.

If the Bulletin's readers feel that the thought which led to this article has any merit, we would appreciate hearing from them. If they think that an annual analysis of agency rules and decisions would be profitable to those who practice administrative law, let them say so. If they are favorably disposed toward such a project, they should begin now to report interesting and important agency

matters to the Editorial Board. Only in this way can a reasonably accurate selection of significant administrative actions be made.

The FCC Influence Cases

Easily the most publicized administrative action of the last decade involved the award of certain television construction permits by the Federal Communications Commission. The story began with public charges of improper influence upon a member of the Commission in hearings before the House Special Subcommittee on Legislative Oversight early in 1958. As the hearings progressed through the summer, additional instances of influence involving other applicants and various Commissioners were revealed.[1] The tale has been told and retold in newspapers and trade publications and will be referred to only briefly herein.

Prompted by the ugly facts of record before the Special Subcommittee, the FCC, in March 1958, petitioned the Court of Appeals (D.C. Circuit) to remand to it the *WKAT, Miami,* Channel 10, case. This case was then pending before that court on appeal of WKAT, an unsuccessful applicant. On April 17, 1958, the court granted the petition to remand with instructions to hold an evidentiary hearing on certain issues relating in part, to the possible disqualification of a member of the Commission because of influence brought to bear upon him. The Commission was also ordered to keep the court informed as to its progress in scheduling the evidentiary hearing.[2]

Sometime later the same court decided the *Boston,* Channel 5, case. The bulk of the court's opinion is devoted to an analysis of the Commission's award of a television construction permit to WHDH. After sustaining the Commission's grant[3] in rather laudatory terms, the court abruptly remanded the case for reconsideration. The stated ground for the remand was that in examining the transcript of the congressional hearings filed in the Channel 10 case (both cases were on appeal at the same time), the court had discovered therein references to *ex parte* solicitation with respect to the Channel 5 case . The court then ordered an eviden-

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[1] For a summary of the story see Report of the Special Subcommittee on Legislative Oversight of the House Committee on Interstate and Foreign Commerce, Independent Regulatory Commissions, H.R. Rep. No. 2711, 85th Cong., 2d Sess. 23-37 (1959).

[2] WKAT, Inc. v. FCC, 103 U.S. App. D.C. 324, 258 F.2d 418 (1958).

[3] Massachusetts Bay Telecasters, Inc. v. FCC, 261 F.2d 55, 56-65 (D.C. Cir. 1958).

tiary hearing in similar terms to that ordered for the Channel 10 proceeding.[4]

On March 1, 1957, the FCC amended Section 3.606 of its Rules,[5] comprising a nationwide allocation of television channels, by transferring VHF Channel 8 from Peoria to the Tri-City area of Iowa and Illinois and by adding UHF Channels 25 and 31 to those already available in Peoria. At the same time, VHF channel 2 was transferred from Springfield, Illinois to Terre Haute, Indiana and St. Louis, Missouri, and UHF Channels 26 and 36 were added to those previously assigned to Springfield. These reallocations were part of a larger scheme looking to the deintermixing of UHF and VHF channels where feasible in order to provide better television service.[6] WIRL, applicant for VHF Channel 8, Peoria and Sangamon Valley Television Corporation, applicant for VHF Channel 2, Springfield appealed the Commission rulings to the Circuit Court and that court unanimously affirmed the Commission's actions [7] whereupon the appellants petitioned for certiorari.

In his brief to the Supreme Court in the *Sangamon* case, the Solicitor General drew the Court's attention to testimony adduced before the House Special Subcommittee on Legislative Oversight subsequent to the court of appeals opinion.[8] This testimony indicated that certain parties had made *ex parte* representations to various Commission members with respect to the rule-making proceedings. On October 20, 1958, the Supreme Court granted the writ of certiorari in both cases and, in view of the revelations as to attempted influence, vacated the judgments of the court of appeals with a remand to that court "for such action as it may deem appropriate." [9]

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[4] Id. at 65-67.

[5] 47 C.F.R. § 3.606 (1958).

[6] These facts are spelled out in detail in two briefs of the United States before the Supreme Court. Brief for the United States and FCC in Opposition, pp. 2-5, Sangamon Valley Television Corp. v. United States, 79 Sup. Ct. 94 (1958); Brief for the United States and FCC in Opposition, pp. 3-8, WIRL Television Corp. v. United States, 79 Sup. Ct. 94 (1958).

[7] Sangamon Valley Television Corp. v. United States, 255 F.2d 191 (D.C. Cir. 1958); WIRL Television Co. v. United States, 102 U.S. App. D.C. 341, 253 F.2d 863 (1958).

[8] Brief for the United States and FCC in Opposition, pp. 7-8, Sangamon Valley Television Corp. v. United States, 79 Sup. Ct. 94 (1958).

[9] Per curiam opinions were rendered in both cases. Sangamon Valley Television Corp. v. United States, 79 Sup. Ct. 94 (1958); WIRL Television Corp. v. United States, 79 Sup. Ct. 94 (1958).

One week later, the Supreme Court ruled on the petition for certiorari filed by WORZ, Inc., unsuccessful applicant for Channel 9, Orlando. In that case, the court of appeals had affirmed [10] without discussion the Commission's award of a television construction permit to Mid-Florida Television Corp., an intervenor. The writ was granted, judgment vacated and the case remanded to the court of appeals in the same terms as the *Sangamon* and *WIRL* cases.[11]

Meanwhile, the Commission had appointed Judge Horace Stern as a special presiding officer to re-hear the *WKAT, Miami,* Channel 10 case. Judge Stern held hearings in September-October 1958, on the issues set out in the court of appeals' order of April 17, 1958. Briefs were filed on November 10, 1958, and oral argument was had on November 17, 1958. Judge Stern's initial decision was released December 1, 1958.[12]

This is the only one of the influence cases to be reheard by the Commission during 1958, although Judge Stern has been designated to hear and decide the *Boston,* Channel 5 case. The issues specified by the Court and Judge Stern's disposition of them both deserve the close scrutiny of the administrative law bar.

The Court's order set out the issues to be determined by the Commission in terms of required findings of fact. The Commission was ordered to find:

> 1. Whether the award may be void *ab initio* or voidable and whether any party may be disqualified to receive the award by reason of misconduct.
>
> 2. What circumstances formed the basis for the public charges that a member of the Commission should have disqualified himself.
>
> 3. Whether anyone influenced, or attempted to influence, any member of the Commission in any manner other than through the recognized and public processes of adjudication.
>
> 4. Whether any party directly, or indirectly, secured, aided, confirmed, ratified or knew of any misconduct found by the Commission to have occurred.[13]

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[10] WORZ, Inc. v. FCC, 103 U.S. App. D.C. 195, 257 F.2d 199 (1958).

[11] WORZ, Inc. v. FCC, 79 Sup. Ct. 114 (1958).

[12] WKAT, Inc., FCC 58D-108 at 1-3 (Dec. 1, 1958), FCC Docket Nos. 9321, 10825, 10826, 10827.

[13] WKAT, Inc. v. FCC, 103 U.S. App. D.C. 324, 258 F.2d 418 (1958).

Judge Stern's findings and conclusions scrupulously adhere to the terms of the Court's mandate. He found as fact, that:

1. The owner of WKAT (Katzentine), through emissaries and aided by Senators Kefauver, Holland and Smathers, attempted improperly and not by the recognized and public processes of adjudication to influence Commissioner Mack in order to induce him to vote for WKAT.

2. The owner of Public Service Television, Inc. (National Airlines, Inc.), through its emissary Whiteside similarly attempted improperly to influence Commissioner Mack in order to induce him to vote for Public Service Television, Inc.

3. A third party (North Dade Video, Inc.), hired a man to enlist the aid of Congressmen and Senators improperly. This hired agent, however, did not actually do anything improper in that regard. But, he did commit an indiscretion by sending Commissioner Craven a brief in favor of his employer after the final decision, but before the petitions for rehearing had been filed. Commissioner Craven did not participate or vote in the proceedings.

4. The pressure upon Mack was more difficult for him to resist because it came from friends and, in the case of Whiteside, from one who had loaned him money over many years and had made substantial gifts to him even after he became a member of the FCC and while the Channel 10 case was pending.

5. National Airlines Inc., Public Service Television, Inc., and WKAT directly, or indirectly secured, aided, confirmed, ratified and knew of the improprieties committed by their respective emissaries.

6. Commissioner Mack, by reason of these facts, was rendered wholly unable to participate and vote with freedom and impartiality in the Channel 10 proceedings.

7. Commissioner Mack did participate and did vote in favor of Public Service Television, Inc.[14]

On the basis of these unequivocal findings, Judge Stern concluded that, as a matter of law:

1. Commissioner Mack should have disqualified himself.

2. Commissioner Mack did not disqualify himself and the grant should, therefore, be revoked and set aside because the hearing was not before an impartial tribunal since one member thereof had been subjected to improper influence.

3. None of the applicants is automatically and absolutely disqualified, but their improper conduct must be considered as a

[14] WKAT, Inc. FCC 58D-108 at 20-21 (Dec. 1, 1958).

factor weighing against them in connection with any award which may hereafter be made.[15]

It is apparent that the court of appeals' order contains an implied directive to the Commission that it examine its collective conscience and publish the result. Somehow this strikes the writer as vaguely irregular, perhaps improper. Never before has a regulatory agency been cast in the role of a penitent forced to make a public confession. Surely this is an unusual obligation to impose upon a governmental organization. Furthermore, examens of conscience and subsequent confessions must surely be based on the breach of commandments, norms and standards which have been defined with certainty by superior authority. Do we have this situation here? Of course, we can say that all men (Commissioners included) are subject to the norms of natural law and ethics. But, these are general rules within the scope of which honest, well intentioned men often find themselves at variance with their brethren.

The order makes no reference to any mandate of positive law. It speaks of "misconduct," of "circumstances forming the basis of charges" and of "influence." The influence to be sought and denounced is said to be that which lies outside the "recognized and public processes of adjudication." [16] These processes are well-known and this admonition does give a certain measure of firmness to the Court's directive. Still the task called for is the making of a moral judgment, not fact finding. This is a far cry from finding hard engineering and financial facts and determining whether such facts meet definite standards set by positive statutory enactment. The writer questions whether an administrative regulatory agency is the proper tribunal to make the sort of judgment called for here—particularly in its own case.[17] Would it not be better to create a special tribunal under particularized statutory authority to try this case and others like it?

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[15] Id. at 21.

[16] WKAT, Inc. v. FCC, 103 U.S. App. D.C. 324, 325-26, 258 F.2d 418, 419-20 (1958).

[17] In fairness to the court, however, it should be noted that the Commission *itself petitioned* for this remand. We should also consider that the only member of the FCC seriously concerned with influence in the WKAT case (Mack) has resigned. The examiner refers to the Commission as *"purged of its offending member."* WKAT, Inc., FCC 58D-108 at 19 (Dec. 1, 1958). However, similar influence cases now pending are alleged to involve improper contacts with Commissioners who are still with the FCC. At least one of the undecided "influence" cases has been remanded on the court's own initiative. Massachusetts Bay Telecasters, Inc. v. FCC, 261 F.2d 55 65-68 (1958).

The hearing examiner does not appear to have been troubled by the doubts which bedevil this writer. He identified sinners and enumerated their sins. He has not, however, simplified the Commission's problem. In fact, he may have made it more complex. Since this is merely an initial decision, the Commission must still shoulder the responsibility for the judgments made, or make new, independent judgments within the context of the same judicial order. In addition, by holding that no applicant is *"absolutely"* disqualified, only *relatively* so, the examiner now asks the Commission to weigh the sins (and indiscretions?) of the various applicants one against the other, and against entirely innocent applicants who may now enter the scene.[18] A strange burden for a federal administrative agency!

The AEC and the Power Reactor Development Company

On January 6, 1956, the Power Reactor Development Company (hereinafter PRDC), applied for a license [19] to construct and operate a 100,000 ekw (electrical kilowatt) fast-breeder nuclear power reactor at Lagoona Beach, some thirty miles south of Detroit, Michigan. The Atomic Energy Commission (hereinafter AEC or Commission), granted a provisional construction permit on August 4, 1956 and within the time prescribed by AEC rules,[20] three labor unions petitioned to intervene. The permit authorized the physical construction of the plant *up to* the introduction of the nuclear fuel.

The petition for intervention was granted and AEC issued a notice of hearing on October 8, 1956, designating a hearing examiner without power to render an intermediate decision. Hearings were held from January 8, 1957, to August 7, 1957 with intermittent adjournments. On March 4, 1957, the State of Michigan was permitted to intervene and thereafter participated in the hearings. More than three months after the conclusion of the hear-

[18] It is not entirely clear whether the examiner contemplates that the Commission should entertain new applicants for Channel 10. He does say, however, that the Commission must consider the "reprehensible activities and improprieties of which the respective parties were guilty . . . in comparison with the qualifications of other applicants. . . . ." WKAT, Inc., FCC 58D-108 at 19 (Dec. 1, 1958).

[19] Pursuant to section 104(b), for industrial and commercial research purposes. 68 Stat. 937 (1954), 42 U.S.C. 2134(b) (Supp. V, 1958).

[20] 10 C.F.R. §§ 2.102(a), 2.701 (Supp. 1958).

ings, the examiner certified the record to the Commission pursuant to its order of October 8, 1956.[21]

Briefs were then filed by PRDC and the intervening unions (hereinafter Intervenors), and oral argument was had before the Commission on May 29, 1958. On December 10, 1958, the Commission released its "Opinion and Initial Decision" [22] continuing the authority of PRDC subject to an "Order" amending the construction permit to provide for a report by the applicant of its activities at stated intervals.

The October 1956, order setting the hearing date also specified the issues as follows:

> A. 1. Whether there is sufficient information to provide reasonable assurances that a facility of the general type proposed can be constructed and operated without undue risk to the health and safety of the public.
> 2. Whether there is reasonable assurance that technical information required to complete the application will be supplied.
> B. Whether the applicant is financially qualified to engage in the proposed activities; and whether the applicant is financially qualified to receive an allocation of special nuclear material.
> C. Whether the applicant should be exempted from any Commission regulation on the ground that such exemption would not endanger life or property or defense or security and is in the public interest.
> D. If the issues are resolved in favor of the applicant, what additional or different provisions, if any, should be incorporated in the permit.[23]

With respect to these several issues, the Intervenors allege both substantive and procedural error. The principal allegations of substantive error relative to issues A and B: safety and financial qualifications. The applicant, the AEC and the Intervenors all seem to agree that present technical and scientific knowledge concerning fast-breeder reactors is insufficient to permit the issuance of an operating license for such a reactor. The applicant, of

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[21] Jalet, A Study in Administrative Law: The Power Reactor Development Company Hearing Before The Atomic Energy Commission, 47 Georgetown L. J. 47, 50-52 (1958). This article is an excellent detailed study of the PRDC case.

[22] Power Reactor Development Co., Opinion & Initial Decision, AEC Docket No. F-16 (Dec. 10, 1958).

[23] Id. at 4-5, The language of the Commission has been paraphrased here.

course, offered evidence tending to prove that such scientific knowledge would be available before the time for licensing arrived. Their contention is that a construction permit is merely a permit to construct; that construction of a nuclear power reactor presents no hazards other than those encountered in any heavy construction project and that nuclear hazards would not arise until the fissionable fuel is loaded into the reactor shell. Applicant stoutly maintains that this latter hazard can be properly considered *only* when the license application is heard.

The Intervenors, however, argue that the distinction between a reactor construction permit and a reactor operating license is only a nominal one. Therefore, this construction permit should be suspended unless there is sufficient evidence in the present record to support issuance of a license to operate.

> "The issue as seen by the Intervenors, however, is that construction of the reactor inevitably means its operation. This contention is based on the argument that the heavy investment in the reactor will generate irresistible pressure for its operation so as to protect the investment itself; corollary is the position that it would be unfair to PRDC to permit it to make a multi-million dollar investment and then deny it a license to operate. As the Intervenors see the problem, issuance of the license is automatic—virtually a ministerial act—once the construction permit has been issued." [24]

Since the cost of the PRDC reactor now stands at $51,100,000 —or $71,595,832, if research and development costs are included —the Intervenors seem to have a valid point.[25] The Opinion and Initial Decision of December 10, 1958, however, very firmly dispels this contention. In fact, the language is perhaps strong enough to create some uneasiness among the PRDC investors.

> "In the case of the PRDC reactor design, however, *PRDC has been on notice since before the first shovel of dirt was moved that its construction permit is provisional* upon further demonstration of many technological facts, including the complete safety of the reactor. The Applicant has, in fact, stated on the record, that it is going to proceed at first under only the construction permit so as to develop a background that will support reasonable assurance that the reactor can be operated in complete safety, and has stated its intention to seek operating authority only after all

[24] Id. at 18.

[25] Jalet, supra note 21, at 59.

necessary facts have been assembled. *Since PRDC has recognized the experimental nature of the reactor it is building and since it has expressly waived any commitment* (if there exists any of the type that the Interveners contend is implied by the construction permit), *for an operating license, the possibility that the Commission would be in any way bound cannot be visualized. It would be hard to imagine a case where an applicant would be less able to argue that he had been misled by previous favorable Commission action.* Under the circumstances of this case, moreover, and in view of the wording of the provisional construction permit, *it must be perfectly clear that PRDC is assuming a substantial financial risk with its eyes wide open,* and that the generation of any pressure from such ingredients would be quite absurd. An operating license may be considered . . . as a logical, but not automatic, sequel to the fulfillment of the conditions of the construction permit, but *we emphasize in this decision* the importance of the present construction permit provisions requiring the demonstration of safety and of satisfying those conditions." [26] (Emphasis supplied.)

Issue A is thus resolved in favor of the applicant, but if PRDC had indeed ever derived the slightest measure of comfort from the thought that the provisional permit was something more than a preliminary step toward the operating license, such comfort must now be a cold and dead thing. Rarely has less equivocal language appeared in the opinion of any tribunal.

The substantive issue of financial qualifications (B) is resolved quite as firmly in favor of the applicant—and here, the Intervenors' argument did not have the same *prima facie* validity. On this issue, the Commission finds that the members of PRDC (public utility companies and equipment manufacturers) have among them a gross equity of two billion dollars and that they have contributed about $23 million to PRDC. The applicant is paying its bills and its credit is solid. "All in all the record shows that PRDC has assets available to it of nearly $49,500,000, and this sum seems to be substantial evidence upon which to base a conclusion of financial responsibility." [27] "Cash on hand . . . is clearly not the only evidence" [28] of financial responsibility.

It is difficult for an observer to take exception to the Commis-

[26] Power Reactor Development Co., Opinion & Initial Decision, AEC Docket No. F-16, at 18-19 (Dec. 10, 1958).

[27] Id. at 24-25.

[28] Id. at 25.

sion's conclusions on this point. In fact, it is difficult to argue with the Commission's ruling on substantive issues A or B. Whatever doubt may be raised by the Intervenors' argument equating the construction permit with the operating license (A), must be resolved temporarily at least, by the very positive holding that such is not the case.[29] In addition, AEC rules do call for the issuance of a provisional construction permit in the absence of some technical data when the Commission is satisfied that the available data provides "reasonable assurance" of safe construction.[30] Although the Intervenors did not prevail on issue A, they did achieve a Pyrrhic victory of sorts. The Commission will certainly not issue an operating license without reopening the entire question of health and safety.

The procedural errors alleged are rather more subtle. Denial of due process is predicated on the theory that the hearing procedure deprived the Intervenors of the opportunity to present their case fully and fairly in violation of the First and Fifth Amendments. Specifically, the Intervenors excepted to: (1) designation and limitation of the issues by the AEC; (2) refusal to grant a hearing on a motion for access to restricted data; (3) submission of testimony by the applicant in the form of written narrative statements without Intervenors' consent; (4) failure to permit the hearing examiner to make an intermediate decision; and (5) alleged bias on the part of former AEC Chairman Lewis Strauss requiring his disqualification. These are very serious allegations going, as one commentator has said, "to the heart of the administrative process." [31] The Commission disposed of them in an abrupt, cursory and entirely unsatisfactory fashion.

> "The argument . . . to the effect that the ruling of the Examiner permitting the introduction of direct testimony in the form of written narrative was error is without merit. . . . (T)he practice is so well established in administrative proceedings as to admit no doubt of its validity.
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> ". . .
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> "The objections of the Interveners to the participation of former Chairman Lewis L. Strauss in the decision and their motion to disqualify him became moot when Mr. Strauss' term as a Commissioner expired on June 30, 1958.

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[29] Power Reactor Development Co., Opinion & Initial Decision, AEC Docket No. F-16, at 18-19 (Dec. 10, 1958).

[30] 10 C.F.R. § 50.35 (Supp. 1958).

[31] Jalet, supra note 21, at 55.

"The Interveners' contention that they were denied a fair hearing because they did not have access to Restricted Data and refused to follow the normal clearance procedures is likewise without merit. The Interveners showed no proof of prejudice or injury, and the legal duty of the Commission to classify certain material as Restricted Data and to establish a system for access to it is readily apparent from the Atomic Energy Act.

"The Commission has considered all the other points raised by the Interveners in their briefs and an oral argument and finds them without merit." [32]

This ignores some important allegations of error and dismisses others rather lightly. Let us examine first those errors which the Commission has noticed. The opinion seems to be correct in its disposition of the alleged error in permitting testimony to be given in written narrative form. The practice is well established in other agencies, e.g., the Federal Power Commission.[33] The statements were taken under oath and opportunity was offered to except to the testimony and to cross-examine the witnesses at a later time. The error, if there be one, is certainly not sufficient to invalidate the proceedings.

The Intervenors' objections to the participation of former Chairman Strauss seem to be rather half-hearted. Nevertheless, it seems somewhat unreal to say that this issue became moot upon the expiration of Mr. Strauss' term. Actually, he functioned as Chairman of the Commission through most of the proceedings, remained in that post for more than six months after the Examiner certified the record to the Commission and for a full month after oral argument.[34] He was absent from the Commission only for the final six months between the oral argument and the decision of December 10, 1958. It may be doubted that the decisional process took place only in that final six month period. It would be more than strange if the former Chairman and his fellow Commissioners never once discussed the case in the year and a half which elapsed between the opening of the Hearings and Mr. Strauss' departure. It seems unbelievable that no step in the deci-

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[32] Power Reactor Development Co., Opinion & Initial Decision, AEC Docket No. F-16, at 26-27 (Dec. 10, 1958).

[33] 18 C.F.R. § 1.20(h) (Supp. 1958).

[34] The Examiner certified the record to the Commission on November 22, 1957. The oral argument was held on May 29, 1958 and Mr. Strauss' term expired on June 30, 1958. Power Reactor Development Co., Opinion & Initial Decision, AEC Docket No. F-16, at 5, 6, 27 (Dec. 10, 1958).

sional process was taken in that time—not even in the seven months between certification of the record and the former Chairman's exit. If they did discuss it, no outsider can say with certainty what attitude the former Chairman took, or what influence his attitude may have had upon his brethren. Even if we assume that he took no part in the decisional process, it seems incumbent upon the Commission to assert this fact. If the former Chairman was biased, as the Intervenors allege, the possibility of his long contact with the proceedings makes it necessary that his influence on the decision be explained or denied. If he was not biased, the Intervenors' allegation on that score should be refuted. In either event, the bare statement that the issue was mooted by the ending of Mr. Strauss' tenure in office is unimpressive and leaves the decision in an unsatisfactory state.

Denial of access to Restricted Data may or may not, have harmed the Intervenors. At the present time, the AEC does have a legal duty to classify certain materials and to establish an access system.[35] It is also true that the Intervenors refused to follow the normal clearance procedures and that they have not shown that denial of access resulted in prejudice and injury. All this, however, avoids the real problem. The statutory basis for denial of access to Restricted Data is the establishment of parallel procedures to prevent disclosure of such data to unauthorized persons "with minimum impairment of the procedural rights which would be available if Restricted Data or defense information were not involved." [36] The Commission has issued regulations [37] which constitute these "parallel procedures." Neither the statutory authority nor the regulations have ever been tested in the courts.

The regulations provide for access to [38] Restricted Data introduced into proceedings and access to Restricted Data not introduced into proceedings.[39] If the data has been "introduced," it will be made available to any party to the proceeding who has an appropriate security clearance, to appropriately cleared counsel for a party and to such other appropriately cleared persons as a party intends to use in connection with the preparation and presentation of his case upon such party's application for an order

[35] 68 Stat. 941 (1954), 42 U.S.C. §§ 2162-63 (Supp. V, 1958).
[36] 68 Stat. 953 (1954), 42 U.S.C. § 2231 (Supp. V, 1958).
[37] Subpart H, AEC Rules of Practice, 10 C.F.R. §§ 2.800-2.814 (Supp. 1958).
[38] 10 C.F.R. § 2.805(a)(1) (Supp. 1958).
[39] 10 C.F.R. § 2.805(b)(1) (Supp. 1958).

granting access.[40] If the data has not been "introduced," a party may apply for access to any Restricted Data required for the preparation of his case subject to "such requirements, conditions and limitations as are deemed necessary to protect Restricted Data." [41] The data must be identified to the extent practicable [42] and it may then be made available "to the party upon his obtaining an appropriate security clearance to appropriately cleared counsel for the party and to such other appropriately cleared individuals as may be needed by the party for the preparation of his case."[43]

These regulations impose serious limitations on the normal concept of administrative due process of law. There is first the factor that the party and his counsel must be cleared. Clearance is refused where derogatory information, indicating that a security clearance would endanger common defense and security, has been developed against the applicant.[44] Since the classes of derogatory information are many in number and comprehensive in scope, it is sometimes easy to fail this test.[45] In the extreme and unlikely case it is, therefore, possible for a party to an AEC proceeding to have a decision rendered against him on the basis of evidence never revealed to him. Another, and perhaps more likely event, is that a party will be denied counsel of his choice because such counsel cannot be cleared. In the same manner, a party may be unable to use the services of carefully selected engineers, accountants and other experts because these individuals cannot be cleared. He would then be forced to rely on experts acceptable to the AEC, but regarded as unsatisfactory or lacking in competency by the party. Finally, as shown by the Commission's decision in the instant case, there is no way of acquiring access to evidence based on Restricted Data *without* complying with the clearance procedures.

It should also be noted that no rule provides for general access to Restricted Data. No party can search for Restricted Data which might be of help to him in preparing his case. This may be of considerable importance where such data is "not introduced" into the proceedings, since unidentified Restricted Data might then be the only means of refuting the other party's contentions.

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40 10 C.F.R. § 2.805(a) (Supp. 1958).
41 10 C.F.R. § 2.805(h) (Supp. 1958).
42 10 C.F.R. § 2.805(f) (Supp. 1958).
43 10 C.F.R. § 2.805(b)(1) (Supp. 1958).
44 10 C.F.R. § 4.10 (Supp. 1958).
45 10 C.F.R. § 4.11 (Supp. 1958).

Some Restricted Data has been sketchily identified and published by the AEC,[46] but the bulk of such data remains unknown. In this situation, a party has no way of determining what, if any, Restricted Data would be useful to him. This is preparing a case under more than ordinary hardships.

The parallel procedures for the utilization of Restricted Data also present intriguing questions with respect to the judicial review of administrative action. It is easy to conceive of a proceeding where it was necessary to introduce Restricted Data and where such data was substantial evidence. The AEC is specifically made subject to the Administrative Procedure Act [47] by its own organic statute.[48] The rule of judicial review, under the Administrative Procedure Act, for decisions of independent federal regulatory agencies is the familiar one expressed in the phrase—substantial evidence upon the entire record.[49] In the case just postulated, this substantial evidence cannot be reviewed by uncleared persons. This means that federal appellate judges—even to the members of the Supreme Court—would have to undergo AEC clearance procedures. It is possible, although concededly unlikely that one or more federal judges might be denied clearance. What then? Review without the substantial evidence of record would not meet the requirements of the Administrative Procedure Act as judicially interpreted and review by uncleared persons would violate the Atomic Energy Act of 1954. Are the parallel procedures due process of law within the meaning of the Administrative Procedure Act? [50]

The Commission's decision does not mention limitation of issues and failure to permit an intermediate decision by the examiner which the Intervenors had cited as error. Neither of these allegations seem to involve prejudicial error. It is not unusual, in fact, it is perhaps normal, to forbid the intervenor from expanding the issues to suit himself.[51] The intervenor takes the case as he finds it! Here, however, the AEC had acted rather precipitately

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[46] 10 C.F.R. Appendix A following § 25.31 (Supp. 1958).

[47] 60 Stat. 237 (1946), 5 U.S.C. §§ 1001-11 (1952).

[48] 68 Stat. 953 (1954), 42 U.S.C. §§ 2231-39 (Supp. V, 1958).

[49] Universal Camera Corp. v. NLRB, 340 U.S. 474, 493 (1951); Gooding v. Willard, 209 F.2d 913, 916 (1954).

[50] The Supreme Court has indicated that the Administrative Procedure Act expresses the essential minimum called for by constitutional due process. Wong Yang Sung v. McGrath, 339 U.S. 33, 49-51 (1950).

[51] Vinson v. Washington Gas Light Co., 321 U.S. 489 (1944). See also Jalet, supra note 21, at 65-66.

in granting the original construction permit—even to ignoring the advice of the Reactor Safeguards Committee. Also, it seems fair to say that the Intervenors were the only truly adversary parties. They were the sole objectors to the grant of a construction permit in any form. An adamant, vigorously contested, absolutely opposed position is often extremely useful in outlining the real issues in a proceeding—in separating the real from the sham. In that posture of this very important case, it might have been wiser to entertain a request by the Intervenors to expand the issues. At the very least, denial of Intervenors' objections to the limitation of issues should have been spelled out in the opinion. If these objections were frivolous, it would be more satisfying to the administrative law practitioner to see this detailed in the opinion, although we recognize that there is no obligation on the Commission to satisfy legal curiosity.

Since the *Universal Camera* [52] case, the importance of detailed findings of fact by an experienced hearing examiner has been a prominent feature of the administrative process. It is a useful and salutary thing for those who have the power of ultimate decision to be able to avail themselves of the findings of one who has lived with the case and has actually seen and heard all the witnesses.[53] This seems especially true in a proceeding where the testimony is complex and the hearing continues for an extended period—as was the case here. It seems particularly unwise for the AEC to have deprived itself of the opportunity to consider the findings which would normally have been made by the able examiner who presided over the *PRDC* hearing. Such findings would have been of substantial assistance to the decisional process.

Agency Potpourri

The Hearing and the Record—(a) In response to a need recognized as urgent by the Civil Aeronautics Board, by Congress and by the various airlines, the Board undertook an extensive investigation of general passenger fares. On January 20, 1958, while this proceeding was in progress, American Airlines filed a motion asking for an expediting of the matter. This motion included a specific request that the Examiner's Initial Decision be eliminated

[52] 340 U.S. 474 (1951).
[53] Id. at 493, 496-497.

and "that the record be certified directly to the Board for final decision."

In an opinion dated March 13, 1958, the Board denied this motion.[54] It recognized that such a deviation from the procedure set out in the agency's rules and in the Administrative Procedure Act is permitted when great necessity requires it, but found that there was no such necessity here. The airlines had been promised interim relief when it was required and the Board had in fact granted one emergency fare increase on January 24, 1958.

In addition, the Board felt that the investigation was so vital and so complex that it would be a violation of public duty to foreshorten it. Such action would also abridge the right of the opposing airlines to a "full and complete hearing." As a practical matter, the Board indicated that issuance of its opinion would be delayed rather than hastened by elimination of the Examiner's report, "a valuable tool or adjunct of the decisional process." This high regard for the Examiner's decision seems more in keeping with the spirit of the Administrative Procedure Act than the action taken by the AEC in the *PRDC* case discussed *supra*.

(b) In an adjudicative proceeding before the Federal Trade Commission regarding the acquisition of Warren Petroleum Company by Gulf Oil, the respondent, Gulf, filed a motion asking that counsel in support of the complaint supply a list of its witnesses and a summary of the subject matter about which these witnesses were going to testify. The Hearing Examiner issued an order requiring each side to furnish the other with this information together with copies of all documents which it intended to introduce into evidence.[55]

The principal basis for his ruling was the scope of the proceeding. "The complaint is as broad as the industry itself, and the geographical area may consist of the entire United States or any section thereof. Any evidence that relates to any phase of the ownership, production, sale or distribution of crude oil, natural gas, natural gasoline, L-P Gas or any product that is or may be derived therefrom is relevant." Because of this scope, a denial of Gulf's motion would have made preparation of effective cross-

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[54] General Passenger Fare Investigation, CAB Docket No. 8008 (Mar. 13, 1958), 7 Pike & Fischer Ad. L. (2d) 935.

[55] In the matter of Gulf Oil Corp., FTC Docket No. 6689 (Oct. 16, 1957 and Feb. 28, 1958), 8 Pike & Fischer Ad. L. (2d) 83.

examination impossible unless the hearing were interrupted after each direct examination by opposing counsel.

All practitioners of administrative law are disturbed by the fact that hearings tend to be interminable and hearing records too voluminous. Overlapping and repetitious cross examination constitutes a major contribution to this undesirable aspect of the administrative process. The Examiner's ruling is a step in the right direction. Properly executed, an order of this kind should speed up the hearing, make for more intelligent, effective cross-examination and shorten the record.

The Examiner also felt that, although the rules of discovery found in the Federal Rules of Civil Procedure do not apply to administrative hearings, fairness demands that in cases like the instant one "respondents be granted reasonable access before trial to basic information and procedural information which will be helpful to them in the presentation of their case . . . ."

Counsel in support of the complaint had opposed the motion for fear his witnesses would be subjected to pressure from Gulf. The Examiner found this fear to be purely speculative, since there was no certainty that witnesses susceptible to such pressure would even be called, and there was no justification for presuming that Gulf would violate the law forbidding such an exercise of influence.[56] The objection seems to have been premature.

The Commission denied an appeal from the Examiner's decision.[57]

(c) At the conclusion of a Federal Power Commission hearing regarding rates on certain sales of natural gas, Shell Oil Company filed a brief and reply brief, but did not file any exceptions because the Examiner's ruling was favorable to its position. Exceptions were filed by others, however, and the Commission subsequently reversed the decision of the Examiner. In an application for rehearing Shell contended that it had a right to answer these exceptions in oral argument.

The petition was denied.[58] The Commission's rules do not provide for briefs in support of or in opposition to exceptions, because Commission orders are based upon the whole record, including all briefs, transcripts of oral argument, Examiner's report and the exceptions. Shell's contentions were, or should have been,

[56] 18 U.S.C. § 1505 (1952).

[57] In the matter of Gulf Oil Corp., supra note 55.

[58] Shell Oil Co., 19 F.P.C. 74 (1958), 8 Pike & Fischer Ad. L. (2d) 224.

fully set out in the record and there was no need to assert them again in rebuttal to the exceptions.

The ruling seems unsatisfactory. The party receiving the favorable decision may not, in fact, have stated his objections completely for fear of jeopardizing the ruling in his favor. Upon reversal of this decision by the Commission, the party now finds himself barred from comment on the exceptions which were the means of reversing the ruling. This appeals procedure seems to put the initially successful party at a procedural disadvantage. He must abide by the ruling in his favor wholeheartedly and lose his right to object to the exceptions, or try to rebut the exceptions and thus possibly contribute to his own downfall.

Jurisdiction—(a) In *Guss v. Utah Labor Relations Board* [59] decided in 1957, the Supreme Court suggested to the National Labor Relations Board that a reappraisal of its jurisdictional standards might be helpful. Accordingly, in October of 1958 new standards were promulgated. A month later the Board used the case of *Siemons Mailing Service* [60] to explain its position. It stated therein that it had revised the jurisdictional standards in order to implement labor legislation more effectively. It also indicated, however, that it intended to continue to abide by jurisdictional standards and not to consider cases on an *ad hoc* basis, because such individual determinations consume too much time and energy.

The mailing service had sought the jurisdiction of the Board on the basis that it performed over $50,000 worth of services on materials mailed out of the state (California). The Board held that, regardless of whether this outflow was "direct" or "indirect," the jurisdictional requirement was met if the total outflow totalled $50,000. The Board went on to explain that for the purpose of this $50,000 jurisdictional requirement, direct and indirect inflow may be totalled as well as direct and indirect outflow. It was clearly stated, however, that there could be no consolidation of inflow and outflow.

(b) In another case decided the same month,[61] the Labor Board retreated somewhat from its resolve to be guided in all cases by its own jurisdictional standards. In representation proceedings

[59] 353 U.S. 1 (1957).

[60] 122 N.L.R.B. No. 13 (Nov. 1958), 8 Pike & Fischer Ad. L. (2d) 611.

[61] Tropicana Products, Inc., 122 N.L.R.B. No. 29 (Nov. 1958), 8 Pike & Fischer Ad. L. (2d) 617.

brought under Section 9(c) of the Act the employer, Tropicana Products, Inc., failed to make an appearance in spite of ample notice, and indicated that it would not produce any records which were not subpoenaed. At the hearing evidence was introduced which showed clearly that Tropicana was engaged "extensively" in interstate commerce. The Board's statutory authority was based on this evidence. Without the employer's records, however, it was impossible to determine whether the dollar volume of this commerce was sufficient to satisfy the Board's self-imposed jurisdictional standards. On this basis the employer challenged the Board's jurisdiction.

The Board held [62] that "the adoption of such [self-imposed] standards in no way precludes the Board from exercising its statutory authority, in any properly filed case, where legal jurisdiction alone is proven, if the Board is satisfied that such action will best effectuate the policies of the Act." The Board felt that the refusal of Tropicana to provide the needed records except under subpoena was a delay tactic which would force postponement of a representation election until another year and thus frustrate the purpose of the proceedings. Accordingly, it denied Tropicana's motion to dismiss.

(c) In 1953, the National Labor Relations Board had found that the R.K. Baking Corporation had discriminatorily denied employment to one Max Winzelberg and that this discrimination had been caused by Local 802 of the Bakery and Pastry Drivers Union. The Court of Appeals for the Second Circuit approved the finding of the Board and remanded the case for a closer determination of the reinstatement and back pay obligations which followed from the order. A hearing was held in the spring of 1955 and some exceptions were filed to the report of the examiner. In October of the same year the Board asked the Court of Appeals to enlarge the scope of the remand order "to enable the Board to receive evidence of all the circumstances surrounding Winzelberg's application for employment, to consider its unfair labor practice findings in the light of such evidence, and then to make such findings and order as would appear to be appropriate." The motion was granted. In April of 1956 the record was reopened and the following year the report of the Trial Examiner was issued. One of the exceptions to this last report filed by the union and the

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[62] Ibid.

company was that under the Board's revised jurisdictional standards there was no longer any jurisdiction in this matter. In an opinion rendered in May of 1958 [63] the Board held that the company's sales were enough to meet the present and past jurisdictional requirements of the Board. But, the Board continued, even if the company did not meet the present revised jurisdictional standards, jurisdiction was validly asserted because this was a proceeding supplemental to a 1953 decision and order.

Speaking generally, fixed, ascertainable jurisdictional standards form a desirable part of the administrative process. However, such standards cannot be permitted to obstruct justice and frustrate the law. These three cases demonstrate that although the NLRB has a high and serious regard for its own jurisdictional standards, it will not allow them to defeat the purposes of the law.

Evidence—(a) During 1958 there was a significant development in the application of the *Jencks* [64] decision to proceedings before the National Labor Relations Board. In the case of *Baltimore Steam Packet Co.*,[65] which was decided in mid-June, the Board held that *Jencks* did not apply and that respondent was not entitled to see certain affidavits which Board Counsel obtained from witnesses prior to the hearing. In making this decision the Board relied upon its prior holdings, especially that in the *Great Atlantic & Pacific Tea Co.* case.[66]

Then on July 3, 1958, the United States Court of Appeals for the Second Circuit held the *Jencks* case applicable to an administrative proceeding before the NLRB, and declared that a written statement used by a witness to refresh his memory shortly before trial must be made available to opposing counsel when he requests it for purpose of cross-examination.[67]

About six weeks later the Ra-Rich Manufacturing Corporation filed with the National Labor Relations Board a motion to reopen the record of a case which had been decided in the spring.[68] The basis of this motion was that the General Counsel had refused to make available to Ra-Rich for purposes of cross-examination a sworn statement which a witness had made to the General Counsel

[63] R. K. Baking Corp., 120 N.L.R.B. No. 101, (May 6, 1958).
[64] Jencks v. United States, 353 U.S. 657 (1957).
[65] 120 N.L.R.B. No. 193 (June 21, 1958), 8 Pike & Fischer Ad. L. (2d) 323.
[66] 118 N.L.R.B. 1280 (1957).
[67] N.L.R.B. v. Adhesive Prod. Corp., 258 F.2d 403 (2d. Cir. 1958), 8 Pike & Fischer Ad. L. (2d) 330.
[68] Ra-Rich Mfg. Corp., 120 N.L.R.B. No. 73 (Apr. 21, 1958).

before the hearing and the existence of which was established on direct examination. The Board held that it was clearly bound by the Second Circuit decision and expressly overruled the *Great A. & P.* case. Accordingly, it ordered the *Ra-Rich* case reopened for the purpose stipulated.[69] There seems to be no valid reason why the *Jencks* case should not be thus applied to NLRB proceedings and indeed to all administrative trial proceedings.

(b) In the case of *Prevailing Minimum Wage for the Scientific, Industrial and Laboratory Instruments Industry,*[70] the Secretary of Labor was faced with a protest from a panel of manufacturers relative to his proposed determination of minimum wages in these industries under the Walsh-Healy Act. This wage determination was based upon information compiled by the Bureau of Labor Statistics of the Department of Labor, which in turn was based upon answers to confidential questionnaires submitted by various manufacturers.

The Industry Panel was given an opportunity to participate in the preparation of the wage exhibit after the questionnaires were returned and to request additional tabulations based on this data. In addition, the Industry Panel was allowed to cross-examine the department's witness as to the methods of obtaining the basic data and of compiling it. But the Hearing Examiner would not grant the request that the confidential replies be made available to the Panel. This denial formed the main basis of the Panel's appeal to the Secretary.

The Secretary found that the right of cross-examination as provided in section 7(c) of the Administrative Procedure Act was not intended to "disturb existing administrative practice," and that such cross-examination as the Examiner allowed "afforded the Panel adequate and reasonable opportunity required by the circumstances for the full and true disclosure of the pertinent economic and statistical facts." Because the Bureau's practice regarding the use of confidential data, and the protection thereof, was well established, the refusal of the Department to violate this confidence was not considered arbitrary or unreasonable. The Panel was not denied a full and fair hearing.

(c) In *Emery Transp. Co.,*[71] applicant sought a certificate of

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[69] Ra-Rich Mfg. Corp., 121 N.L.R.B. No. 90 (Aug 28, 1958), 8 Pike & Fischer Ad L. (2d) 428.

[70] Labor Dept., 23 F.R. 1986 (1958).

[71] ICC No. MC-114019 (Jan. 16, 1958), 8 Pike & Fischer Ad. L. (2d) 94.

public convenience and necessity for common carrier trucking service from Cudahy, Wisconsin to various points in the East. The sales supervisor for the supporting shipper testified for applicant to the effect that the shipper had lost a Providence, Rhode Island customer because delivery was not fast enough. The protesting railroads attempted to cross-examine as to the name of this customer, but the Examiner sustained applicant's objection to the question. The Interstate Commerce Commission affirmed this ruling by the Examiner, and held that the loss of the customer, rather than his identity, was the important factor and that refusal to identify this customer could only go to the weight of the testimony. It could not affect its admissibility. The Commission's point seems eminently well-taken.

(d) In the case of *P. J. Gruber & Co.*,[72] the Securities and Exchange Commission denied an application of a Delaware corporation for registration as a broker-dealer and also refused to allow withdrawal of the application, because it found that the parties in control of this corporation had acted in violation of the securities laws. One of the exceptions offered by the applicant and considered by the Commission was that the Examiner had given greater weight to the sworn testimony of the corporation's president at the hearing than he gave to statements which were stipulated and which the controlling stockholder would have made if called as a witness. The Commission did sustain this objection and held that "oral testimony is not entitled to greater weight than stipulated testimony merely because the latter is not under oath. . . ." [73] The objection, however, had no effect upon the denial of the application or of the permission to withdraw.

Order of Proof—In *American Louisiana Pipe Line Co.*,[74] a petition to intervene in an action before the Federal Power Commission was filed by parties representing the interests of the Upper Peninsula of Michigan for the purpose of demonstrating that public convenience and necessity demanded a supply of natural gas to that area. Even though the prospective intervenors had sufficient notice of the order of proof required by the Commission, they did not adduce testimony in support of their petition during the period granted for presentation of their own case, but at-

[72] SEC Securities Exchange Act Release No. 5627 (Jan. 15, 1958).

[73] Id. at n. 5. Some doubt is cast on the significance of this pronouncement since it is relegated to a footnote.

[74] 19 F.P.C. 1 (1958), 8 Pike & Fischer Ad. L. (2d) 222.

tempted to do so by means of cross-examination of the witnesses of one of the two competing applicants. The Presiding Examiner sustained objections to such cross-examination and his action was affirmed by the Commission.[75] As we had occasion to note earlier, abuse of cross-examination leads to extended hearings and bulky records. The abuse in this instance would also have caused a confused and poorly constructed record which would have made the decisional process more difficult. The only certain means of preventing such abuse is by firm and clear rulings by the presiding officer.

The prospective intervenors then filed a motion for leave to adduce direct testimony. This motion was denied by the Commission as wanting in good cause, since the parties had had ample opportunity to present this evidence as part of their direct case and had failed to do so.[76]

Burden of Proof—(a) One of the more interesting variations of the problem of burden of proof is reflected in the case of *Seaboard Oil Company*.[77] Two independent producers of natural gas applied to the Federal Power Commission for authority to sell in interstate commerce the gas produced in certain fields in Louisiana. A third applicant, the prospective buyer of this gas, applied for permission to build and operate the equipment necessary to receive this gas and transport it to its existing pipeline. The Presiding Examiner granted certificates of public convenience and necessity to all three.

Staff counsel for the FPC then filed an exception on the sole grounds that the producer-applicant had not introduced sufficient evidence to justify the proposed initial price of 19.5¢ per mcf. It was urged, therefore, that a rate condition should be incorporated into the certificates granted to the producers, limiting this price to 18¢. In support of this exception, counsel for the Commission argued that, although it had been shown that the 19.5¢ price would not affect the price paid by the customers or competitors of the buyer-applicant, this price might affect the over-all price structure of the gas industry, and that the burden of disproving this possibility rested with the producer-applicant. The Commission sustained the Examiner in his holding that "while the burden of proving all elements of a case of public con-

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[75] Ibid.

[76] Ibid.

[77] FPC Docket No. G-11970 (Mar. 31, 1958), 8 Pike & Fischer Ad. L. (2d) 29.

venience and necessity was on the applicant that where the issue of the attachment of a rate condition to the certificate was injected into a proceeding by another party to the proceeding that the burden of going forward with the evidence relating to the issue so injected was on the party raising the issue, although the actual burden of proof never shifted." [78]

Commissioner Connole registered a strong dissent to the effect that, where public convenience and necessity are involved, price is always in issue and does not have to be injected, and that Staff Counsel is not "a third party" in the sense that it must bear the burden of proving that a proposed price is not justified.

(b) In some proceedings, the burden of proof may be made to seem more onerous by the absence of opposition. In an Interstate Commerce Commission case decided early in 1958, application had been filed by the Pacific Inter-Mountain Express Company and the Union Transfer Company for merger and for acquisition of the latter by the former. There were many competing carriers who did not, however, intervene for the purpose of showing deleterious effects on competition or on the existing traffic pattern.

The Commission found that the competitors' failure to intervene did not relieve the applicants of the burden of introducing affirmative evidence regarding the effect of such a merger upon the competing carriers.[79] Without such evidence the Commission felt that it could not fulfill the duty imposed upon it by Congress and enunciated in *McLean Trucking Co. v. United States.*[80] In that case the Supreme Court said that interstate carriers' immunity from prosecution under the antitrust laws was predicated upon the Commission's obligation "to consider the effect of the merger on competitors and on the general competitive situation in the industry in the light of the objective of the national transportation policy."

(c) Rule 506 of the Civil Aeronautics Board's Rules of Practice in Economic Proceedings provides that the proponent of a rate change has the burden of showing that the proposed rate is "just and reasonable, and not otherwise unlawful." The case of *Railway Express Agency, Inc.*[81] is a clear application. The express company

[78] Ibid.

[79] Pacific Intermountain Express Co., ICC No. MC-F-6199 (Feb. 26, 1958), 8 Pike & Fischer Ad. L. (2d) 235.

[80] 321 U.S. 67 (1944).

[81] CAB Docket No. 8055 (Oct. 16, 1958), 8 Pike & Fischer Ad. L. (2d) 543.

sought an increase in its charges for excess valuation and for C.O.D. service on the basis of a general increased cost of operation. The Board held that, since the company made no claim as to the inadequacy of the basic rate for air express service, it had the burden of showing the percentage of the increased operating cost which was allocable to accessorial service as distinguished from direct transporation. This the company had not done.[82]

In this same action Bureau Counsel sought to reduce the current charges made by the express company for these accessorial services to the level of the charges imposed by certificated air carriers. Reliance was placed on the failure of the company to supply certain information regarding excess valuation charges which were requested by Bureau Counsel at a prehearing conference. In the same opinion the Board found that, whereas the express company was the proponent of a rate *increase* and carried the burden of proof with relation thereto, Bureau Counsel was the proponent of a rate *reduction* and was required to produce affirmative evidence that the proposed lower rate would be fair and reasonable. Bureau Counsel had also failed to carry its burden.

This disposition of burden of proof is similar to the handling of burden of proof in our trial courts and this seems to be proper for judicial-type administrative hearings.

(d) In 1954, hearings were held by the Bureau of Land Management relative to two sand and gravel placer mining claims, wherein the government charged that minerals "had not been found within the limits of the claim in sufficient quantities or quality to constitute a valid discovery." The issue involved in this charge was whether the sand and gravel found on the lands claimed could be "extracted, removed, and marketed at a profit." The Hearing Examiner held the claims valid because he found that the government had not produced enough evidence to sustain its charge. The Bureau Director reversed the Examiner, stating that the government's only duty was to make out a *prima facie* case, and this it had done. Thereafter, he held, the burden of proof shifted to the claimants to disprove the charge by a preponderance of the evidence. On appeal to the Secretary of the Interior the Director's position was affirmed.[83] In the opinion handed down in January 1958, the Secretary clearly stated that

[82] Ibid.

[83] United States v. Everett Foster, Interior Dept. No. A-27421 (Jan. 8, 1958).

the claimants had not borne the burden of proof relative to the potential disposition of the sand and gravel which had allegedly shifted to them. "It was their own inability to show a present market for the deposits plus the Government's showing that no such market exists which defeated them." Since the government filed these charges against the mineral claimants, it is somewhat surprising to find that the claimants have the burden of disproving them. This is a pronounced departure from the rule found in the courtroom.

Rule Making—On May 8, 1957, the Federal Communications Commission published in the *Federal Register* a Notice of Proposed Rule Making wherein Channel 8 was temporarily assigned to Harrisburg, Illinois and Channel 3 to Carbondale, Illinois. In March of 1958 it assigned these channels in reverse order, *i.e.*, Channel 3 to Harrisburg and Channel 8 to Carbondale. It was argued to the Commission that this action violated the requirements of notice as provided in section 4 of the Administrative Procedure Act.

In an opinion handed down in July of 1958,[84] the Commission found that the statute was satisfied by a description in the Notice of Proposed Rule Making of the issue and the subject matter involved. It found, moreover, that this notice invited comments and counterproposals and that all parties were thereby put on notice both as to the Commission's proposal and as to any alternative proposal which the Commission might find to be more in the public interest.

Examiners—(a) The Hibbard Dowel Company of Chicago was charged by Local 18-B of the Furniture and Bedding Workers Union with committing various unfair labor practices under the National Labor Relations Act and a complaint was issued by the General Counsel of the Board. One of the charges was that the employer had refused to "bargain in good faith with Local 18-B as the recognized and later exclusive bargaining representative of its employees. . . ." Several times during the hearing, the Examiner suspended proceedings and urged the parties to engage in further negotiations looking to an agreement. No objection was made to this at the hearing. But after the Examiner issued his Intermediate Report which was adverse to respondents, they charged that the Examiner was guilty of misconduct in that he

[84] Television Channel Assignments in Carbondale-Harrisburg, Ill., FCC (July 30, 1958), 8 Pike & Fischer Ad. L. (2d) 388.

"engaged in conciliation or mediation in contravention of Section 4(a) of the Act, requiring dismissal of the complaint."

The Board found [85] that this charge was not justified, even though the Examiner's action was ill-advised. "Although the Trial Examiner suggested bargaining and was present on one occasion while the parties bargained, so far as appears, the Trial Examiner did not participate in any way in the bargaining negotiations themselves. . . . [He] did not perform any conciliation or mediation functions, or so conduct himself as to require dismissal of the complaint."

The Board found further that respondents' charge was untimely and that the Examiner was not prejudiced by the failure of the parties to reach an agreement.

(b) In processing the application for an extension in service by a motor carrier, Midwest Coast Transport, Inc., the Interstate Commerce Commission put into effect a new rule allowing the Examiner to announce his decision at the close of testimony and to direct the prevailing party to prepare and submit a draft of a suggested report and order to him.

The contesting rail carriers claimed that this rule violated the Administrative Procedure Act, because the final written report would not be that of the Examiner, but would be a report by the prevailing party which had merely been adopted by the Examiner.

The Commission found no merit in contestant's claim.[86] It held that, while the particular rule is new to the ICC, the procedure is an established one in other federal agencies and civil courts. The Examiner is not expected to adopt the report verbatim, but is to make such modifications as he may deem necessary. The Commission concluded, therefore, that the rule involved no deprivation of due process.

(c) On January 25, 1956, an immigration hearing was begun before a Special Inquiry Officer to determine if a native-born Rumanian should be admitted to the United States as a returning resident. The alien gave considerable testimony, but after a certain point in the proceedings his counsel refused to let him answer any question on cross-examination by the examining officer, since he felt that the statute required that the Special Inquiry Officer alone should perform this function. This refusal to answer

[85] Hibbard Dowel Co., 119 N.L.R.B. 1763 (1958).

[86] Midwest Coast Transport, Inc., ICC No. MC-111812 (Feb. 25, 1958), 8 Pike & Fischer Ad. L. (2d) 233.

questions propounded by the examining officer was construed by the Special Inquiry Officer as a failure to meet the burden of proof imposed upon an applicant for admission to the country. Accordingly, the alien was held inadmissible.

The Board of Immigration Appeals found that [87] the applicant was not excludable on any of the grounds specified by the Special Officer. It found, moreover, that the Officer had "failed to perform the duty placed upon him by statute," *i.e.*, the duty to cross-examine, and, therefore, that there was "no justification for his action in drawing an adverse inference from the appellant's refusal to submit to cross-examination by some other officer."

The case was certified to the Attorney General [88] who affirmed the alien's admissibility for permanent residence. His opinion overruled the Board, however, regarding the use of the examining officer on cross-examination. It stated that, although the statute governing exclusion proceedings does not provide for use of these examining officers, still those statutory provisions which apply generally to the exclusion of aliens give the Attorney General the right to question those seeking admission and he has the power to delegate this task to the examining officers designated by him.

Substantive Law—Columbia General Investment Corporation filed a registration statement with the Securities and Exchange Commission on March 29, 1956, covering 100,000 shares of common stock. The Commission notified the registrant that it was considering issuance of a stop order relative to the statement because of certain deficiencies. Before the commencement of proceedings relative to the stop order, Columbia requested permission to withdraw the statement. This request was denied. After the proceedings were begun registrant submitted an amended statement. At the conclusion of the hearings, the Examiner recommended issuance of a stop order.

On appeal to the Commission, Columbia argued that its motion to dismiss should have been granted because it had an "absolute right" to withdraw its registration statement. This contention was based upon the Supreme Court decision in *Jones v. SEC.*[89] The

[87] In Re M———, Board of Immigration Appeals File No. A-6421949 (June 4, 1958), 8 Pike & Fischer Ad. L. (2d) 443.

[88] In Re M———, Attorney General File No. A-6421949 (Sept. 5, 1958), 8 Pike & Fischer Ad. L. (2d) 442.

[89] 298 U.S. 1 (1936).

Commission rejected this argument [90] pointing out that the *Jones* case and the instant case were distinguishable. "Unlike the situation in the *Jones* case, the registrant in the instant case has approximately 1800 public investors holding a substantial number of the same class of share as are proposed to be offered under the registration statement." The deficiencies which Columbia's statement was alleged to have contained related to misleading statements made to these prior investors, and the Commission felt that these investors had a right to know the results of its inquiry into the matter. Registrant's right to withdrawal, therefore, was held to be a qualified one, subject to a preferred right in the investing public.

Registrant also contended that the motion to dismiss should have been granted because the original deficient statement was totally superseded by the amended one. The Commission held [91] that its consideration of any amending statement was discretionary, not mandatory. Otherwise, registrants would be encouraged to include in the original registration "materially false, misleading and inadequate statements with the expectation that if any of them were discovered, a corrective amendment could be filed." The Commission felt that in this case discretion did not dictate consideration of the amendment. As a matter of fact, however, it did examine the amendment and found that deficiencies were still present. Accordingly, the Commission ruled that the stop order should issue.[92]

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[90] Columbia Gen. Inv. Corp., SEC Securities Act Release No. 3901 (Mar. 5, 1958), 7 Pike & Fischer Ad. L. (2d) 898.

[91] Ibid.

[92] Ibid.

THE SUPREME COURT'S CURRENT IMAGE OF ADMINISTRATIVE REGULATION

VICTOR G. ROSENBLUM *

INTRODUCTION

Utilizing a view of administrative regulation as the embodiment of comprehensive experience, integrity, expertise, flexibility and representation of the public interest, the Supreme Court continued to give "hospitable scope" to the powers and procedures of administrative agencies during the past two terms. In addition to sanctioning contested agency procedures and agency statutory interpretations in key instances, the Court reinterpreted the impact of the *Watkins* and *Jencks* decisions thus reducing whatever potential application the earlier broad rulings might have had by analogy to the administrative process.

At the same time, in other significant cases, the Court showed that it would react vigorously to evidence that specific administrative actions were unauthorized, were arbitrary and inflexible, or were potentially corrupt.

Finally, the Court underscored the importance to practitioners of having the agencies set their rules and decision making processes on the record; for the Court indicated that it would hold the agencies rigidly to their declared processes, even though they would not be bound to follow a particular process in the absence of such declaration.

What follows in this article is an analysis of the Supreme Court's major decisions affecting administrative law during the 1957 and 1958 terms, as well as selected Court of Appeals decisions, under four headings: I. Judicial bases for broadening the scope of administrative power; II. The contours of "primary jurisdiction"; III. Judicial reactions to disproof of integrity, authorization, expertise or flexibility; and IV. Procedures "of record" as a check on administrative excess.

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I. Judicial bases for broadening the scope of administrative power

A. *Approvals of procedural discretion keyed to the image of agency experience, expertise, flexibility, and embodiment of the public interest.*

That the Court is impressed with agency claims of expertise and representation of the public interest that warrant procedural discretion was shown clearly in *Moog Industries v. FTC* and *FTC v. C. E. Niehoff & Co.*, 355 U.S. 44, and in *NLRB v. Fant Milling Co.*, — U.S. —, 27 Law Week 4423. In a per curiam decision in the *Moog* and *Niehoff* cases, Justice Whittaker not taking part, the Supreme Court held that it is not within the reviewing authority of a Court of Appeals to postpone the operation of a valid cease and desist order of the FTC against a single firm until similar orders have been entered against that firm's competitors. Both Moog and Niehoff contended that they would suffer serious financial loss if prohibited from engaging in pricing practices that remained open to their respective competitors.

In the course of its opinion, the Court stressed the "specialized experienced judgment," the "expert understanding," and the "special competence" of the Commission. In the shaping of remedies within the framework of regulatory legislation, "an agency is called upon to exercise its specialized, experienced judgment. Thus, the decision as to whether or not an order against one firm to cease and desist from engaging in illegal price discrimination should go into effect before others are similarly prohibited depends on a variety of factors peculiarly within the expert understanding of the Commission." Although an allegedly illegal practice may appear to permeate an entire industry, "whether such appearances reflect fact and whether all firms in the industry should be dealt with in a single proceeding or should receive individualized treatment are questions that call for discretionary determination by the administrative agency."

Furthermore, the Court concluded, "the Commission alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically." Only a "patent abuse of discretion" could justify overturning the Commission's discretionary determination.

Writing for a unanimous court in the *Fant* case, Justice Stewart re-emphasized and broadened a holding by the Court in *National Licorice v. NLRB,* 309 U.S. 350, authorizing the Board in an unfair labor practice proceeding to deal with practices arising after the Board's charges have been filed where all practices "are of the same class of violations as those set up in the charge and were continuations of them in pursuance of the same objects." Justice Stewart reversed the decision of the Court of Appeals, 258 F. 2d 851, which had ruled that the NLRB's charge must set up facts showing an unfair labor practice and that "the facts must be predicated on actions which have already been taken."

A charge filed with the NLRB, Stewart maintained, "is not to be measured by the standards applicable to a pleading in a private lawsuit. Its purpose is merely to set in motion the machinery of an inquiry. The responsibility of making that inquiry and of framing the issues in the case is one that Congress has imposed upon the Board, not the charging party." The "basic scheme" of the National Labor Relations Act was not to have the Board "adjudicate private controversies" but to "advance the public interest in eliminating obstructions to interstate commerce . . . Once its jurisdiction is invoked, the Board must be left free to make full inquiry under its broad investigatory power in order properly to discharge the duty which Congress has imposed upon it. There can be no justification for confining such an inquiry to the precise particularizations of a charge."

Despite the denial at the end of the opinion that the Board is left "carte blanche to expand the charge as they might please or to ignore it altogether," Justice Stewart's decision adds to the difficulties of the attorney who must represent his client without knowing the specific charges that may later be made against him.

Approval of the exercise of administrative discretion as a "prophylactic and preventive measure" and as a "policy of nipping potentially destructive practices before they reach full bloom" was given by the Court in two other unanimous decisions involving the Federal Trade Commission, *FTC v. Mandel Brothers,* 359 U.S. 385, and *FTC v. Simplicity Pattern Co.,* — U.S. —, 27 Law Week 4389.

In the *Mandel* case, the FTC found substantial misbranding in violation of three of the Fur Products Labeling Act's six disclosure requirements. The Commission issued cease and desist orders against misbranding products in all six categories, not merely in

the three in which there had been findings. Citing the Commission's "wide discretion" in the choice of a remedy deemed adequate to cope with the unlawful practices disclosed by the record. Justice Douglas maintained that "this agency, like others, may fashion its relief to restrain other like or unlawful acts." The judicial function in this type of situation is merely to determine if the trier of facts has exercised allowable discretion. Where there are findings of substantial and extensive misbranding the Commission may conclude within its discretion that "like and related acts of misbranding should be enjoined as a prophylactic and preventive measure."

The *Simplicity Pattern* case centered about the question whether the presence of "cost justification" or the absence of competitive injury may constitute a defense to a violation of Paragraph 2(e) of the Clayton Act as amended by the Robinson-Patman Act, prohibiting discrimination in services or facilities to competing purchasers. The Commission issued a cease and desist order against Simplicity's practice of giving certain free services and facilities to variety store chains but not to fabric stores. Simplicity did not dispute the Commission's findings but contended that even if competition takes place between variety stores and fabric stores, Simplicity's conduct may be justified by showing either that no competitive injury resulted or that the differences in treatment reflected the differences in costs in dealing with the two types of customers.

The Court of Appeals had held that although absence of competitive injury would not constitute a justification, Simplicity might rebut the prima facie case by showing that the discriminations reflected differences in costs. 258 F. 2d 673.

Justice Clark's opinion for the unanimous Supreme Court made clear that neither cost justification nor absence of competitive injury was a defense. He relied chiefly on statutory construction, but administrative practitioners might wonder about the significance of his "note in passing" that "the Commission has indicated a willingness to give a relatively broad scope to the standard of proportional equality under 2(d) and 2(e) of the Act." Simplicity did not contend before the Commission that the tailoring of services and facilities to meet the different needs of two classes of customers did in fact constitute "proportionally equal terms"; yet Clark indicated that that might have been a successful defense.

However, "since the issue is not properly before us, we, of course, do not pass on it."

The Court recognized that "Simplicity has apparently acted entirely in good faith." While some services and facilities were furnished free only to variety stores, other kinds of services and facilities, valued by Simplicity at more than $1,000,000 annually were furnished only to the fabric shops. If representation of the public interest is a basic factor in administrative regulation, and if the FTC "has indicated a willingness to give relatively broad scope to the standard of proportional equality," would it serve the public interest to require the agency to make its willingness known to the defendant? Since an administrative proceeding is not like an action at private law, as the Court emphasized in the *Fant* case, should this fact produce concomitant agency obligations to a defendant as well as the additional powers over him?

The power of an agency to modify decisions due to its alleged inadvertent error was examined by the Court in *American Trucking Assns. v. Frisco Transportation Co.,* 358 U.S. 133. The Court sustained, 7 to 1, the Interstate Commerce Commission's assertion that Section 17(3) of the Interstate Commerce Act, which provides that "The Commission shall conduct its proceedings under any provision of law in such manner as will best conduce to the proper dispatch of business and to the ends of justice," authorizes such corrections, as long as there is opportunity for notice and hearing. If this broad enabling provision were not so construed, the Chief Justice stated, the Commission would be powerless to take remedial steps once an error has occurred and "this would not, as Congress provided, 'best conduce to the ends of justice.' "

The Supreme Court concluded after examination of the hearing examiner's report, the opinions of the commissioners in the case and the rules of the Commission that there was substantial evidence to support the Commission's finding that the original omissions were due to inadvertence. Warren denied the claim that Division 5 of the Commission improperly took official notice of the Commission's internal practices and procedures, the Chief Justice asserting that "We fail to see what prejudice could have accrued from taking judicial notice of the practices, for appellee had adequate opportunity to rebut inferences drawn from them on its argument to the full Commission . . . Particularly is this true where there is no showing that the procedures were misstated to appellee's prejudice." The precise scope of the Supreme Court's

ruling is not clear. On the one hand Warren declared that statutory language instructing the Commission to adopt procedures that will conduce to the ends of justice gave the ICC a "similar power" to that of the courts "to correct judgments which contain clerical errors or which have issued due to inadvertence or mistake." On the other hand, he declared that 17(3) of the Interstate Commerce Act "authorizes the correction of inadvertent *ministerial* errors" (emphasis mine). Perhaps proof of the *ministerial* element holds a key to the distinction between the present case and *U.S. v. Seatrain Lines,* 329 U.S. 424, where the Court found that the Commission had reopened prior proceedings to execute a subsequently adopted policy rather than to correct a mistake.

B. *Applications of "hospitable scope"*

Early in the 1957 term, in a brief unanimous opinion upholding suspension by the Internal Revenue Service's Alcohol and Tobacco Tax Division of a wholesale liquor permit under the Federal Alcohol Administration Act because of the wholesaler's requirement that retailers purchasing scarce whiskey also take certain amounts of plentiful items, Justice Douglas explained the Supreme Court's reason for reversing the Court of Appeals' conclusion that tie-in sales did not violate Section 5 of the Act. The Court of Appeals "was constrained to read the Act narrowly," he said, "as it conceived it to be penal in nature when it forfeited a permit to do business. But we deal here with remedial legislation whose language should be given hospitable scope."

Despite the agency's request to Congress at one time for an amendment to Section 5 because it doubted that violations of the statute could be established through tie-in sales under existing provisions, Douglas concluded that the administrative practice "quite consistently reflected the view that such sales are banned by the act." The Court's grant of "hospitable scope" to construction of the agency's practices and of the statute itself thus accounted for the validation of the license suspension. *Black v. Magnolia Liquor Co.,* 355 U.S. 24.

(1) The Court's view of administrative interpretation of "hot cargo" provisions

In *Local 1976, United Brotherhood of Carpenters, v. NLRB, NLRB v. General Drivers Union, Local 886,* and *Local 850, Inter-*

national Association of Machinists v. NLRB, 357 U.S. 93, the Court had to decide whether a "hot cargo" provision in collective bargaining agreements can be a defense to a charge of an unfair labor practice under 8(b)(4)(A) of the Taft-Hartley Act when, in the absence of the "hot cargo" provision, the union's conduct would unquestionably be a violation. Recognizing the "checkered career" the question has had in the decisions of the NLRB, the Court decided 6-3 to sustain the current interpretation by the Board, "duly heedful of the strength of the argument to the contrary." The Board had concluded that a union may not order its members who work for the secondary employer to cease handling goods of the primary employer with whom the union is at odds on the assumption that the secondary employer will respect his contractual obligation; hence the Board proscribed any direct appeal to the employees to engage in a strike or concerted refusal to handle goods.

Justice Frankfurter's opinion for the majority stressed the Board's "closeness to and familiarity with the practicalities of the collective bargaining process" and concluded that on a matter involving "practical judgment" on what is necessary to preserve the secondary employer's freedom of choice, in accord with the intent of Congress, "the judgment of the Board must be given great weight and we ought not set against it our estimate of the relevant factors."

The Court balked, however, at the suggestion in the Board's brief that "hot cargo" provisions are automatically invalid in contracts in which the secondary employers are common carriers subject to the Interstate Commerce Act. Frankfurter politely cautioned the NLRB against exceeding the scope of its statutory mandate. "Other agencies of government, in interpreting and administering the provisions of statutes specifically entrusted to them for enforcement, must be cautious not to complicate the Commission's interpretation of its own act by assuming as a fixed and universal rule what the Commission itself may prefer to develop in a more cautious and pragmatic manner through case-by-case adjudication."

Taking its cue from Justice Frankfurter, the ICC on June 1 of this year followed the "cautious and pragmatic manner" by holding in one instance that the Commission is warranted in granting a line-haul certificate to a company organized by non-union short lines to remedy service deficiencies caused by a unionized line-haul

carrier's refusal to provide service to non-union short line carriers when such refusal follows "the official or unofficial dictates of the union without giving any consideration to their obligations as franchised public carriers." *Nebraska Short Line Carriers,* ICC Docket MC-116067. On the same day, the ICC ruled that past service deficiencies resulting from a unionized carrier's refusal to interline freight with a non-union carrier and refusal to provide pickup and delivery service for picketed shippers, at the demand of the union, did not warrant the remedial grant by the Commission of additional service authority to the non-union carrier. *Galveston Truck Line Corporation Extension,* ICC Docket MC-8544. Again following the Frankfurter opinion, the Commission expressed its desire to make unmistakably clear that it was not in these cases attempting to adjudicate any labor dispute or controversy. Since the Commission's decisions appear to have been tailored to conform to Frankfurter's opinion, there is reason to expect judicial "hospitality" if the ICC rulings are appealed.

(2) Examples of judicial unanimity

In other significant cases sanctioning agency interpretations of their statutory mandates the Supreme Court approved:

unanimously the NLRB's conclusion that "employee committees" established to deal with the company on grievances and working conditions are "labor organizations" within the meaning of the Taft-Hartley Act, that Section 9(a) reserving to any group of employees the right to adjust grievances without the intervention of the bargaining representative does not remove employee committees from Section 8(a)(2)'s use of "labor organization," and that the company could be ordered to disestablish the committees as the representative of any of their employees for the purpose of dealing with respondents concerning grievances, labor disputes, wages, rate of pay, hours of employment or conditions of work. *NLRB v. Cabot Carbon Co.,* — U.S. —, 27 Law Week 4357.

unanimously the proposition that initiation of a proceeding to readjust the tolls of the Panama Canal is a matter that Congress left to the discretion of the Panama Canal Company and that the rate-making authority of the Canal Company falls consequently within Section 10 of the APA excluding from categories of cases subject to judicial review agency action "by law committed to agency discretion." The relief sought in the action was to compel

the Canal Company to fix new tolls. Justice Douglas denied the relief, explaining that judicial relief is "often available" in situations "where the matter is peradventure clear, where the agency is clearly derelict in failing to act, where the inaction or action turns on a mistake of law." Where, however, as here, "the duty to act turns on matters of doubtful or highly debatable inference from large or loose statutory terms, the very construction of the statute is a distinct and profound exercise of discretion . . . We then must infer that the decision to act or not to act is left to the expertise of the agency burdened with the responsibility of decision." *Panama Canal Co. v. Grace Line,* 356 U.S. 309.

unanimously that the issuance of a license by the Federal Power Commission to a municipality to construct a power project delegates "federal rights" to the City and that State laws cannot bar the licensee from acting under the license. Justice Whittaker explained that the State exercised its right to seek review of the Commission's findings and order under 313(b) of the Federal Power Act, that the Court of Appeals rejected the State's contentions, and that the result in the Court of Appeals, as declared by Congress, "shall be final." *City of Tacoma v. Taxpayers of Tacoma,* 357 U.S. 320.

unanimously the interpretation of the Federal Food, Drug, and Cosmetic Act by the Secretary of Health, Education and Welfare to the effect that, where a coal tar color is not harmless, it is not to be certified; if it is not certified, it is not to be used at all. Justice Brennan ruled that the test of certification laid down in 406(b) of the Act "concentrates on the color substance itself; it is to be listed only if *it* is harmless." Hence the failure of the Secretary to find that coal tar dye Red 32 is used in such quantities in coloring oranges as to create risk of injury does not invalidate his finding that the dye has toxic effect and his order removing Red 32 from the approved list. Legislation postponing the effective date of the Secretary's order for three years did not render the case moot. *Flemming v. Florida Citrus Exchange,* 358 U.S. 153.

unanimously the NLRB's delegation to hearing officers of power to pass on motions to revoke subpoenas duces tecum under Section 11 of the Taft-Hartley Act, since the hearing officer's ruling was merely preliminary and the Board itself retained final decision on the merits. *NLRB v. Duval Jewelry Co.,* 357 U.S. 1. The Court also ruled unanimously on the same day that the NLRB's delegation to hearing officers of power to pass on motions to revoke

subpoenas ad testificandum was authorized by Section 6 of the Taft-Hartley Act. Accordingly, the Court found it unnecessary to pass on whether 7(b) of the APA granted a power withheld by the National Labor Relations Act. *Lewis v. NLRB* 357 U.S. 10.

(3) Two examples of 5-4 cleavage

The Court approved by 5-4 vote, the interpretation by the Immigration and Naturalization Service that an alien who had been paroled into the U.S. while admissibility was being determined was subject to exclusion and was not "within the United States" so as to qualify for discretionary withholding of deportation by the Attorney-General under 243(h) of the Immigration and Nationality Act. Clark stressed the distinction in Title II of the Act between exclusion proceedings and deportation proceedings and the separate administrative procedures that apply to exclusion and deportation. Douglas, Warren, Black and Brennan—a foursome of dissenters to appear again in *Barenblatt, Pittsburgh, Palermo, Rosenberg* and other cases in which they deemed the construction of civil rights the major issue—dissented on the ground that the "true guide" to humane provisions of our law is "the spirit of the law," rather than the letter. There should not be a narrow reading, they maintained, that makes it the duty of our officials to send people "to what may be persecution or death." *Leng May Ma v. Barber,* 357 U.S. 185; *Rogers v. Quan,* 357 U.S. 193.

In *Farmers Educational and Cooperative Union v. WDAY,* — U.S. —, 27 Law Week 4521, Clark joined Douglas, Warren, Black and Brennan in concluding that "the fact that the Federal Communications Commission—the body entrusted with administering the provisions of the Act—has long interpreted § 315 as granting stations an immunity" from liability for libelous statements broadcast by legally qualified candidates for public office does "more than balancing any adverse inferences drawn from congressional failure to legislate an express immunity." Accordingly, the Court held that WDAY had no authority to delete libelous material from a candidate's broadcast and could not be held responsible under a State libel law for defamatory statements made by the candidate.

Frankfurter's dissent, joined by Harlan, Whittaker and Stewart, maintained that the State libel law did apply to WDAY despite the fact that the station could not have censored the defamation in the candidate's broadcast. He based his conclusion on "due regard

for the principle of separation of powers limiting this Court's functions and respect for the binding principle of federalism, leaving to the States authority not withdrawn by the Constitution or absorbed by the Congress." Readers of the dissent may also detect "due regard" for the language of the proposed H.R. 3.

(4) Douglas v. Harlan on regulation of transients' housing, variable annuities and pipeline rates

The "hospitable construction" of powers exercised by the FHA in interpreting the National Housing Act to prohibit rental of Section 608 veterans housing apartments to transients, of the SEC in holding that variable annuities are not insurance contracts and hence not exempt from regulation by the SEC under the Securities Act and Investment Company Act, and of the FPC in holding that it has jurisdiction under Section 4 of the Natural Gas Act to accept filing of new rates by a pipeline when the pipeline's service agreements reserve the right to file changed rates, even though the pipeline's customers have not agreed to a specific increase, was given effect by the Court over some strong opposition by dissenters. In all three instances, Harlan and Douglas were the principal judicial protagonists.

In *Federal Housing Administration v. The Darlington,* 358 U.S. 84, the majority, through Justice Douglas, stressed the FHA's contemporaneous construction of the Housing Act as containing no express or implied right or privilege to rent government insured veterans housing apartments to transients. Recognizing that the statute contained "no express provision one way or the other" on the subject of transients at the time Darlington's FHA mortgage was negotiated, Douglas asserted that "in circumstances no more ambiguous than the present we have allowed contemporaneous administrative construction to carry the day against doubts that might exist from a reading of the bare words of a statute." The majority found such construction by the FHA implied in its application forms and an agency book on Planning Rental Housing Projects, and applied directly in a letter to its field offices in 1951. None of the agency's formal regulations at that time construed the statute to prohibit transients, however.

Justice Harlan was joined by Frankfurter and Whittaker in his dissent. He emphasized that at the time Darlington's FHA mort-

gage was consummated and insured in December 1949, neither the controlling statute nor the FHA's regulations under it prohibited rentals to transients. In his view, "the true issue is not whether the statute under which Darlington's mortgage was insured *gave* the right to an FHA-insured mortgagor to make such rentals, but rather whether it *prohibited* such a mortgagor from making them." In the absence of such prohibition Darlington could make the occasional transient rentals shown by the record, and the provisions of the 1954 amendment which do contain such prohibition could not be applied retroactively.

Douglas again wrote the majority opinion and Harlan the dissent, with Frankfurter, Whittaker and Clark joining the dissent, in *SEC v. Variable Annuity Life Insurance Co.,* 359 U.S. 65. Agreeing with the SEC that a life insurance company can be enjoined from offering annuity contracts to the public without registering them under the Securities Act and complying with the Investment Company Act, Douglas contended that in the variable annuity "there is no true underwriting of risks, the one earmark of insurance as it has commonly been conceived of in popular understanding and usage." A concurring opinion by Brennan, with Stewart joining him, considered it meaningless "to view the problem as one of pigeonholing these contracts" in the category of insurance or the category of securities. In its securities laws Congress intended a "broad coverage" and gave the SEC "broad dispensing powers." Congress should not have to reenact its general regulatory scheme every time a new form of enterprise is introduced. "If there is deemed wise any adjustment of the regulatory scheme in the light of new developments in the subject matter to which it extends, Congress may make it."

In his dissent, Harlan accused the majority of "analysis by fragmentization" and of a "constricted color matching approach" to statutory construction "which fails to take adequate account of the historic Congressional policy of leaving regulation of the business of insurance entirely to the States." Bona fide experiments in the insurance field, even though such developments may also have securities aspects, should be "classed within the federal exemption of insurance, and not within the federal regulation of securities."

In *United Gas Pipe Line Co. v. Memphis Light Division,* 358 U.S. 103, Harlan wrote the majority decision and Douglas the dissent, with Black and Warren joining Douglas, and Clark taking no part. Reversing the Court of Appeals' ruling, 250 F. 2d 402,

that the Commission lacked jurisdiction to consider under Paragraph 4(e) of the Natural Gas Act the lawfulness of United's new rate schedules containing changes whose specific amount had not been mutually agreed on between seller and purchaser, Harlan carefully distinguished the present case from *United Gas Pipe Line Co. v. Mobile Gas Service Co.*, 350 U.S. 332, on the ground that United bound itself by contract to furnish gas to Mobile at a single fixed rate, whereas here the contracts between purchasers and seller called for payment at the current "going" rate. "United, like the seller of an unregulated commodity, has the right in the first instance to change its rates as it will, unless it has undertaken by contract not to do so." Harlan stressed the fact that the record "amply supported both factually and legally" the Commission's interpretations. He also emphasized the "demand" of "business reality" that natural gas companies not be precluded by law from increasing prices "whenever that is the economically necessary means of keeping the intake and outgo of their revenues in proper balance."

Douglas found "insuperable difficulties" with Harlan's reasoning. He felt that the essence of the ruling in *Mobile* had been the prohibition on unilateral changes in contracts and that a change does not become bilateral merely through an agreement to pay whatever may be the "effective" rate. This time Douglas was not inclined to allow much discretion in construction to the agency. "The construction of this tariff is a question of law which we should resolve in light of the regulatory system that Congress has imposed on the industry." Asserting that the Court majority "makes a shambles of the Act so far as consumer interests are concerned," he predicted that "administrative difficulties" make it doubtful that consumers would receive any of the refunds even if the Commission should ultimately decide in a 4(e) proceeding that the new rates are not just and reasonable.

The scope of the Commission's power under Section 4 was construed again by the Court of Appeals after the Supreme Court's *Memphis* decision. The question before the Court of Appeals was whether forehanded contractual provisions can modify the regulatory provisions of the Natural Gas Act. Here the natural gas producers claimed that the rate increase called for by automatic escalation clauses in their contracts with pipelines were not rate "changes" that the FPC had authority to require producers to support with proof of reasonableness. Relying on the *Memphis*

and *Mobile* decisions, the producers maintained that if a change in price under an escalation clause is not a change in the contract under contract law, then, similarly, it is not a "change" of a filed contract or rate schedule or a "new schedule" under 4(d) of the Act, and notice is not required and may not be filed.

Justice Reed wrote the Court of Appeals decision and emphasized that "the Commission's basic power is to regulate any rate it determines is 'unjust, unreasonable, unduly discriminatory, or preferential.' " Omitting any reference to "business reality" but referring to the "primary aim" of the Natural Gas Act as "to protect the consumer against exploitation at the hands of natural gas companies," he concluded that one aid to such an aim is to have the FPC weigh the needs of the gas companies by an examination of costs and profits. Thus contractual provisions between purchasers and sellers of natural gas could not modify the FPC's powers under Section 4 of the Act. *Episcopal Theological Seminary of Southwest v. FPC* — F. 2d —, 27 Law Week 2647.

C. *Limitations on the applicability of the* Watkins *and* Jencks *rules to administrative agencies*

Although neither case affected directly the administrative practices of an agency, facets of both *Watkins v. U.S.,* 354 U.S. 178, and *Jencks v. U.S.* 353 U.S. 657, appeared to be potentially applicable to administrative practice. In *Watkins,* for example, Warren's statements on the need for specificity in the delegation of power and the need for equation, through fair procedures, of power with responsibility could apply as readily to administrative agencies as to Congressional committees. Investigations conducted by the use of compulsory process, Warren asserted, "give rise to a need to protect the rights of individuals against illegal encroachment. That protection can be readily achieved through procedures which prevent the separation of power from responsibility and which provide the constitutional requisites of fairness for witnesses." This theme was expanded in *Jencks* when, with Clark the only dissenter, as in *Watkins,* the Court held that the defendant in a criminal prosecution for filing false non-Communist affidavits with the NLRB was entitled to an order directing the government to produce for inspection all reports of government witnesses to the FBI pertaining to subject matter as to which they testified at trial.

In *Barenblatt v. U.S.,* — U.S. —, 27 Law Week 4366, the majority

denied that vagueness in delineating jurisdiction of a Congressional committee makes ineffective the grant of power to compel testimony. Granting the vagueness of the authorization, Harlan wrote, it should not be read "in isolation from its long history." The "proper meaning of an authorization" to Congressional committees is derived in similar manner to the meaning of legislation: "by the gloss of legislative reports, administrative interpretation and long usage." Black's dissent, concurred in by Warren and Douglas, sought to revive the doctrines of early administrative law decisions by the Court, such as *Panama Refining,* 293 U.S. 388, and *Schechter Poultry,* 295 U.S. 495, to support his contention that where the Court deals with governmental procedures which reach "to the very fringes of Congressional power," then "more is required of legislatures than a vague delegation to be filled in later by mute acquiescence." In a separate dissent, Brennan labelled the investigation of Barenblatt "adjudication of a sort through the exposure process" and believed it to be "outside the constitutional pale." If the *Watkins* case ever did suggest revitalization of the *Panama Refining* and *Schechter* doctrines on delegation of power, the majority's decision in *Barenblatt* seems to have laid that implication of *Watkins* back to rest

After the decision of the Supreme Court in *Jencks,* the Court of Appeals for the Second Circuit applied the Jencks rule directly to the practices of an administrative agency. *NLRB v. Adhesive Products,* 258 F. 2d 403. Judge Medina held that a statement admittedly used by a witness to refresh his recollection shortly prior to testifying at an administrative hearing must be produced on demand by counsel for purpose of cross examination. Recognizing that there were conflicts of authority on the matter, the Court of Appeals held that "in our opinion this conflict has been resolved by the decision of the Supreme Court in *Jencks v. U.S.*"

The Supreme Court's 1959 decisions involving the *Jencks* rule leave uncertain at best the question whether it applies *a fortiori* to administrative agencies as the Court of Appeals held. The majority opinions by Clark in *Pittsburgh Plate Glass Co. v. U.S.,* — U.S. —, 27 Law Week 4464, and by Frankfurter in *Palermo v. U.S.,* — U.S. —, 27 Law Week 4471, and in *Rosenberg v. U.S.,* — U.S. —, 27 Law Week 4478, limit the *Jencks* rule to "federal criminal prosecution." In holding that *Jencks* did not apply to inspection of a witness' grand jury testimony related to his subsequent trial testimony, Clark contended that to make public any part of a grand

jury's proceedings would inevitably detract from its efficacy. Other reasons given by Clark for refusing to allow inspection of grand jury testimony might later be applied to refusal to allow inspection of testimony before an administrative agency. Clark stated, for example, that inspection could impair "that independence required of an accusatory and inquisitorial body" and that testimony by witnesses would be "parsimonious" if each witness knew that his testimony would soon be in the hands of the accused. Allegations of need for full disclosure by witnesses and for agency independence will, no doubt, form a basic part of the brief in behalf of secrecy if and when the scope of the *Jencks* rule is tested further.

Applicability of the rule to administrative proceedings is complicated also by Frankfurter's assertions for the majority in *Palermo* and in *Rosenberg*. He points out that "since its enactment 18 USC (Supp. V) Paragraph 3500 and not the *Jencks* decision governs the production of statements of government witnesses for a defendant's inspection at trial." Furthermore, Frankfurter is critical of federal judges who acceded to "those excessive demands" of counsel for defendants who "began to invoke the *Jencks* decision to justify demands for production far more sweeping than that involved in *Jencks* and under circumstances far removed from those of that case." Brennan's dissents in *Pittsburgh* and *Rosenberg* and concurring opinion in *Palermo,* joined in each instance by Warren, Douglas and Black, took sharp issue with the majority's view of the inapplicability of *Jencks* to grand jury proceedings and of the meaning of the so-called "Jencks Act." Even the dissenters, however, did not construe the *Jencks* rule to apply beyond "a defendant on trial in a criminal prosecution." Application of *Jencks* to administrative agencies may be warranted by common sense and logic but it is as yet premature to conclude that it is warranted by the precedent of the case itself.

D. *Significant additional approvals of administrative discretion by the lower courts*

Boards of Education charged with the administration of pupil-placement laws can exercise both investigatory and quasi-judicial powers, and since parents who refuse to submit to examination by members of the Board have not exhausted their administrative remedy, they are not entitled to appeal from the Board's adverse decision to a federal court, according to a unanimous Court of

Appeals for the Fourth Circuit in *Holt v. Raleigh City Board of Education,* 265 F. 2d 95. The application of administrative law to the desegregation process was the result of a North Carolina statute providing that parents who desire reassignment of a child must make application to the Board of Education and if the application is refused, must apply to the Board for a hearing. The Holts, a Negro family, declined to attend the Board's hearing in person, contending that the statute could not be construed to clothe the Board with both investigatory and adjudicative powers. The exercise of general exploratory and investigatory powers would make impossible the impartial hearing which the statute required the Board to hold, they maintained.

Judge Soper upheld the District Court's dismissal of the Holts' complaint, commenting that "in this day when administrative agencies and tribunals carry on the operations of government in many fields of activity, it would be an anachronism to hold that investigatory and quasi-judicial powers may not be conferred upon the same governmental agency. Indeed, such a combination of functions is established practice generally approved by the courts and subject to judicial review in case of abuse. In the operation of the public schools, such an arrangement is well nigh essential . . ."

In an interpretation of the requirements of § 5(b) of the APA, the Court of Appeals for the Fifth Circuit ruled that it was not an abuse of discretion by the SEC to fail to afford adequate opportunity to confer informally, in the absence of a showing that such informal conference "would have been fruitful or would have obviated or simplified the subsequent formal hearing," in a stop order proceeding for suspension of registration. *Columbia General Investment Corp. v. SEC,* 265 F. 2d 559.

The Second Circuit Court of Appeals openly criticized the press-release practices of the SEC for apparent prejudgment, but agreed with the Commission that failure to assert the defect of prejudgment before the Commission once the release was available amounted to a waiver of the objection. *Gilligan, Will & Co. v. SEC* — F. 2d —, 27 Law Week 2649. The SEC had issued a press release three days after issuance of its order commencing these proceedings, the release stating that the broker-dealers involved had violated Section 5 of the Securities Act of 1935. Judge Lumbard cautioned the Commission that its reputation for objectivity and impartiality "is opened to challenge by the adoption of a

procedure from which a disinterested observer may conclude that it has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." Nonetheless, the Court accepted the Commission's claims of waiver of the defect, upheld the Commission's construction of "public offering" and "distribution," and sanctioned the Commission's ruling that broker-dealers had offered the securities for public sale and should have registered them if the offerees, though small in number, did not have actual information or access to information such as registration would have disclosed.

Distinguishing the Supreme Court's decision in *Kent v. Dulles,* 357 U.S. 116, Judge Prettyman, in a decision of the Court of Appeals for the District of Columbia Circuit, upheld the Secretary of State's denial of passport renewal to newspaperman William Worthy who refused to promise compliance with his passport's ban on travel to certain Communist areas. "In the case at bar," Prettyman wrote, "no beliefs, associations or personal characteristics are involved . . . We think the designation of certain areas of the world as forbidden to American travelers falls within the power to conduct foreign affairs." Believing as a matter of "hard, practical reality" that the prevention of clashes with foreign governments involves restrictions upon acts of our own citizens "which may reasonably be foreseen as breeding clashes," Prettyman upheld the Secretary's denial of passport renewal on both constitutional and statutory grounds. The Court of Appeals did not indicate that the Secretary must find specifically that the passport applicant's conduct or status "may reasonably be foreseen as breeding clashes." *Worthy v. Herter,* — F. 2d —, 27 Law Week 2631.

The Federal Trade Commission is not confined to the formal language of a contract between an advertiser and broadcasting stations but may view the contract's requirements "in the setting of all the other relevant evidence" to determine whether it violates Section 1(d) of the Robinson-Patman Act, according to a recent decision by a split Court of Appeals for the Third Circuit, *Lorillard v. FTC,* — F. 2d —, 27 Law Week 2635. The Commission had found that Lorillard's contract for broadcast time, although it specifically negatived any agreement other than that contained in the written contract, accounted for discrimination by Lorillard in merchandising allowances to grocery chains. Brochures utilized by the broadcasting companies offered in-store promotions to prospective advertisers and asserted that the broadcasters had firm

contractual commitments for the in-store displays with the grocery chains. The chains, in turn, received specified amounts of radio or television time.

The majority approved of the Commission's refusal "to wear blinders" and its insistence that the series of contracts be viewed as a whole, rather than rely on "technical rules of contract law." As a result the Court upheld the Commission's finding that Lorillard's advertising contract with the broadcasting stations called for discriminatory payments for the benefit of the grocery chains in the form of the radio or television time. Judge Steele dissented, contending that there was no discriminatory payment by a vendor for the benefit of a customer as required by the Act, since the execution of the agreements by Lorillard with the broadcasting companies was not a contingency upon which the right of the grocery chains to air time depended.

The question of "what would or would not be inconsistent with the public interest" in a proposed merger of airlines is for the CAB and not for the courts to decide, Judge Prettyman emphasized in an opinion by the Court of Appeals for the District of Columbia Circuit in *North Central Airlines v. CAB,* 265 F. 2d 581. Asserting that problems like airline mergers "cannot be solved by a mathematical computation" but depend on the exercise of judgment vested by Congress in the agency, Prettyman sanctioned the CAB's refusal to approve the contract whereby North Central Airlines was to acquire 96% of the stock of Lake Central Airlines. Judge Prettyman limited the judiciary's role in reviewing the agency's action to insuring that "the agency stays within the bounds of reason and outside the realm of caprice."

II. The contours of "primary jurisdiction."

During the past two years, there have been five major cases in which "primary jurisdiction" has been involved: *Denver Union Stock Yard Co. v. Producers Livestock Marketing Assn.,* 356 U.S. 282; *Federal Maritime Board v. Isbrandtsen,* 356 U.S. 481; *U.S. v. RCA,* 358 U.S. 334; *TIME Inc. v. U.S.* and *Davidson Transfer Co. v. U.S.,* 359 U.S. 464; and *Southwestern Sugar and Molasses Co. v. River Terminals Corp.,* — U.S. —, 27 Law Week 4457.

A. *Effect of per se violation*

In a 6-3 decision in the *Denver* case, the majority, through Justice Douglas, ruled that a stockyard regulation barring marketing

agencies or dealers using its facilities from soliciting business for other markets or diverting livestock from that stockyard constituted per se violation of Section 304 of the Packers and Stockyards Act, making unnecessary a full hearing before the Department of Agriculture under Paragraph 310 of the Act. Douglas held applicable to the present case the Court's observation in *Storer Broadcasting,* 351 U.S. 492, that it never presumes that Congress intended an agency "to waste time on applications that do not state a valid basis for a hearing." In his concurring opinion, Clark stated that primary jurisdiction is placed in the Secretary of Agriculture to determine whether the invalidity on the face of the stockyard's regulations can be overcome by evidence showing that their operation is not in fact unjust, unreasonable or discriminatory. However, he did not favor following "the normal course of action," which would be to remand the case to the Secretary for a full hearing, because such remand would be a "useless formality" in the light of "irrefutable acknowledgment" of intent to monopolize the Colorado livestock market.

The dissents by Whittaker and Frankfurter, with Harlan joining them, stressed the fact that "Congress gave to the Secretary—not to the courts—the duty and power to determine what regulations of a stockyard owner are or will be just, reasonable, and nondiscriminatory . . . and prescribed the method for challenging and for determining the validity of such regulations." The proceeding should have been remanded to the Secretary for appropriate action, they maintained.

B. *Primary jurisdiction as "fact marshaling"*

The *Isbrandtsen* case, another 6-3 decision, found Frankfurter again dissenting vigorously, this time with Harlan and Burton, as the majority reversed the action of the Federal Maritime Board and held that a steamship freight conference's dual-rate system designed to offset the effects of non-conference competition violated Section 14, Third, of the 1916 Shipping Act. Reviewing earlier cases involving both primary jurisdiction and Section 14, Third, like *Cunard,* 284 U.S. 474, and *Far East Conference,* 342 U.S. 570, Justice Brennan concluded that "these cases, while holding that the Board had primary jurisdiction to hear the case in the first instance, did not signify that the statute left the Board free to approve or disapprove the agreements under attack . . . It is recognized that the courts, while retaining the final authority to

expound that statute, should avail themselves of the aid implicit in the agency's superiority in gathering the relevant facts and marshaling them into a meaningful pattern."

C. *Primary jurisdiction as "law-enforcing"*

Frankfurter viewed this construction of "primary jurisdiction" by the majority as turning the doctrine into an "empty ritual" and "wasteful futility." The doctrine of primary jurisdiction was not devised for "purposeless delay" or for using the administrative agency as a "sterile conduit" to the courts. It was based, rather, "on the discharge of functions for which courts normally have neither training and experience nor procedural freedoms" and was the product of "legislative realization, judicially respected, that the regulatory needs of modern society demand law-enforcing tribunals other than the conventional courts." Within the limits of statutory authorization and constitutional due process, "a large range of discretion is entrusted to administrative agencies to make effective the social and economic policies adopted by Congress in the myriad concrete situations calling for their application." The doctrine limits the power of courts to pass on the merits of questions like whether rates are reasonable, whether discriminations are fair, and whether practices that might otherwise "fall afoul of the Sherman Act are permissible under a legislative regime for a particular industry that to that extent supersedes the antitrust laws." The question of the validity of the dual-rate contract system was thus to Frankfurter, "one lying within the Board's administrative discretion."

On the basis of the majority's ruling in *Isbrandtsen,* "primary jurisdiction" was merely a device to assist courts in gathering relevant facts and "marshaling them into a meaningful pattern." Frankfurter's view that the doctrine distributes law-enforcing roles between courts and administrative agencies received no recognition from the majority.

D. *The need for "a pervasive regulatory scheme"*

In a 7-0 decision, with Frankfurter and Douglas taking no part, the judges agreed in the *RCA* case that the primary jurisdiction doctrine does not bar the government's antitrust suit based on a transaction approved earlier by the Federal Communications Commission. Warren concluded that primary jurisdiction was not ap-

plicable here because, there being "no pervasive regulatory scheme and no rate structures to throw out of balance, sporadic action by federal courts can work no mischief. The justification for primary jurisdiction accordingly disappears."

E. *Primary jurisdiction and common law remedies*

The Court of Appeals had ruled in *TIME* and *Davidson* that a shipper challenging the reasonableness of tariff rates collected by a certificated interstate motor common carrier on past shipments was entitled to an ICC determination of the question of reasonableness even though the Motor Carrier Act gave the ICC no power to award reparations. 252 F. 2d 178, 259 F. 2d 802. With Black, Warren, Douglas, and Clark dissenting, the majority, through Harlan, reversed the Court of Appeals.

Harlan viewed the landmark *Abilene* case, 204 U.S. 426, as having decided that any common law right to recover an exorbitant common carrier freight charge paid under protest was necessarily extinguished as absolutely inconsistent with recognition of the Commission's primary jurisdiction under Part I of the Interstate Commerce Act. He then maintained that it would be "anomalous" to hold that Congress, "which we cannot assume was unaware of the holding of the *Abilene* case," intended that the effect of its omission of reparations provisions in the Motor Carrier Act would be to require a party to initiate suit in a court and then immediately proceed to the ICC to litigate what would ordinarily be the sole controverted issue. "No convincing reason has been suggested to us why Congress would have wished to omit a direct reparations procedure, as it has concededly done here, and yet leave open to the shipper the circuitous route contended for." The majority rejected the government's contention that the Commission's primary jurisdiction over determination of the reasonableness of rates could be exercised as an adjunct to a judicial proceeding asserting a common law right to reparations.

The dissenters disputed the majority's views on several basic points. They maintained that the Commission's primary jurisdiction was compatible with survival of the common law right to reparations through a judicial proceeding; that the *Abilene* case held that the power to determine the reasonableness of rates was primarily and exclusively vested in the Commission, not that the existence of primary jurisdiction destroyed all judicial remedies;

that there was no showing of Congressional purpose to take away the pre-existing remedy through passage of the Motor Carrier Act; and that "a steady line" of ICC interpretations of the Motor Carrier Act had decided that the Act leaves shippers the right to sue in the courts for damages resulting from the unreasonable rates. "I am unable to understand," Black commented, "why the Court strains so hard to reach so bad a result." Nonetheless, the majority's view prevailed that the existence of primary jurisdiction in an administrative agency extinguishes pre-existing common law rights unless there is the "clearest indication" of Congressional intent to preserve those rights.

F. *The blend of administrative and judicial expertise*

In the *Southwestern Sugar* case, the Court decided 6-3 that the ICC should be given an opportunity to pass on the validity of the exculpatory clause contained in a towboat's tariff filed with the agency, but that the Court of Appeals should have ruled first on other defenses, which, if upheld, would have obviated the need for the ICC's ruling. The dissenters, Warren, Black and Douglas, maintained in a five-line dissent that the exculpatory clause relieving the towboat of liability for negligence was void as a matter of law, relying on *Bisso v. Inland Waterways,* 349 U.S. 85.

Harlan again wrote the majority opinion. With no formal discussion of the doctrine of "primary jurisdiction," he assumed that the question whether an exculpatory clause offends public policy is one appropriate ultimately for judicial rather than administrative resolution, and concluded "that does not mean that the courts must therefore deny themselves the enlightenment which may be had from a consideration of the relevant economic and other facts which the administrative agency charged with regulation of the transaction here involved is peculiarly well equipped to marshall and initially to evaluate."

The majority's decision appeared in effect to accomplish what the dissenters had sought in *TIME:* a blend of agency expertise in the area in which it has primary competence with judicial expertise in the areas in which judges have primary competence. If called upon to distinguish between *TIME* and *Southwestern Sugar,* Harlan could no doubt point to the fact that *TIME* was found to hinge on statutory interpretation denying "pervasive authority" to the ICC whereas the present case involved both a

"pervasive regulatory scheme" and "a contractual arrangement on its face consensual."

Predicting with assurance and consistency when a matter must be referred to an agency before it may be reviewed by a court and what degree of finality attaches to the agency's decision on the matter will no doubt have to await future Court decisions. There is, nonetheless, a refreshing lack of concern with doctrinal formalism and an engaging aura of practicality about the *Southwestern Sugar* decision that may well yield an optimum blend of administrative and judicial expertise in resolving future questions on a pragmatic basis.

III. Judicial reactions to disproof of administrative integrity, authority, expertise, or flexibility

A. *Questions of integrity and authorization*

The many manifestations of the Supreme Court's sympathetic image and hospitable construction of administrative power must not be construed as indications that the Court would not respond to evidence that a particular agency's practices had somewhat tarnished its image. In most instances, as we have seen, the judges assumed that administrative agencies operate with integrity, expertise and flexibility and that they have broad discretion in applying their statutory authority. When doubts have arisen about integrity, authority, expertise, or flexibility, however, the Court has not hesitated to remand or reverse the agency's action.

When, for example, the Solicitor General drew the Court's attention to testimony before the House Special Subcommittee on Legislative Oversight subsequent to decision of the cases by the Court of Appeals, that *ex parte* representations had been made to FCC members with respect to proceedings that might have affected the cases, the Supreme Court vacated the judgments of the Court of Appeals and remanded them "for such action as it may deem appropriate," Clark and Harlan dissenting. *Sangamon Valley Television Corp. v. U.S.* and *WIRL Television Corp. v. U.S.*, 358 U.S. 49.

The Court's hospitable construction of agency applications of statutory authority did not extend to situations in which there was no basic enabling statute or executive order. Thus, in *Harmon v. Brucker* and *Abramowitz v. Brucker*, 355 U.S. 579, the Court, in a per curiam decision with Clark dissenting, emphasized that "gen-

erally, judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers." On the basis of the Court's own consideration of the law and the concession by the Solicitor General that less than honorable discharges issued by the Secretary of the Army in these cases were not sustainable if the courts had jurisdiction to review the Secretary's action, the Court concluded that the Secretary had no authority to condition the type of discharge he issued on pre-induction conduct.

In an 8-1 decision on the last day of the term, the Court decided that the Defense Department had no authorization by statute or executive order of the President to create an industrial security program under which a government contractor's employees may be excluded from their jobs in proceedings that deny them the right to confrontation and cross-examination. *Greene v. McElroy,* — U.S. —, 27 Law Week 4528. Citing *Kent v. Dulles,* 357 U.S. 116, in which the majority held that the Secretary of State had no authority to condition issuance of a passport on the furnishing of a non-Communist affidavit by the applicant, *Wong Yang Sung v. McGrath,* 339 U.S. 33, and *U.S. v. Rumely,* 345 U.S. 41, among others, Warren reiterated "the Court's concern that traditional forms of fair procedure not be restricted by implication and without the most explicit action by the Nation's lawmakers, even in areas where it is possible that the Constitution presents no inhibition."

An effort by the NLRB to deny that the District Courts have jurisdiction over a suit to vacate action in a certification proceeding by the agency that is admittedly in violation of Section 9(b)(1) of the Taft-Hartley Act met with failure in *Leedom v. Kyne,* 358 U.S. 184, despite the dissent of Brennan and Frankfurter to the effect that the Taft-Hartley Act intended to curtail judicial review in such situations. Whittaker's opinion for the majority raised the question whether the law affords a remedy, apart from the review provisions of the Act, for unlawful action by the Board which injures the respondent. "We think the answer surely must be yes," he concluded. "This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers."

The *Sangamon, Harmon, Greene, Kent,* and *Leedom* decisions were typical illustrations of the Court's continuing concern with maintaining integrity, proper authorization and traditional forms

of fair procedure in administrative practice. The Court also invalidated agency actions where lack of sufficient evidence to justify the agency's findings was deemed due to failure to apply the full scope of its expertise or to rigidity rather than flexibility in its procedures.

B. *Questions of agency flexibility and the application of expertise*

One of the most interesting decisions in this category was the unanimous decision on June 22 of this year in *Atlantic Refining Co. v. New York Public Service Comm.*, — U.S. —, 27 Law Week 4460. Although the FPC appeared only as *amicus curiae,* the issues in the case concerned the jurisdiction of the FPC under Section 7 of the Natural Gas Act and whether there was sufficient evidence to support permanent certification by the FPC of the proposed sale of gas by CATCO to Tennessee Gas.

The Court, through Justice Clark, concluded that there was insufficient evidence to support a finding of public convenience and necessity prerequisite to the issuance of the permanent certificates. The record was examined meticulously, the Court allowing no presuppositions about the agency's expertise to serve as a substitute for facts in the record. The Court found no support in the record for the FPC's conclusory finding that "the public served through the Tennessee gas system is greatly in need of increased supplies of natural gas." Clark felt that efforts should have been made in the record to give the "reason why" the proposed price was some 70% higher than the weighted average cost of gas to Tennessee. The Court objected also that the $16,000,000 pipeline to the producers' wells was unsupported "by evidence of practice or custom" and that the evidence as to whether certification would not lead to an increase in rates by Tennessee Gas "was not only unsupported but has already proven unfounded."

Of additional interest to the administrative practitioner is the point that, in reaching its decision, the Court attached significance to the internal realities of FPC procedures. In holding that the FPC must accord "most careful scrutiny and responsible reaction to initial price proposals of producers under § 7," the Court based its ruling on "the inordinate delay presently existing in the processing of § 5 proceedings." This careful appraisal, not only of agency findings but also of internal agency administrative bottlenecks, is another sign of enlarged judicial concern with the practical realities of the administrative process.

Earlier reversals of administrative actions in the 1957 and 1958 terms embodying similar concern by the Court with the realities of administrative expertise and flexibility included:

Rowaldt v. Perfetto, 355 U.S. 115, in which the Court reversed an Immigration Service order of deportation under Section 22 of the Internal Security Act, which order had been based on the alien's own testimony before the Hearing Examiner that he joined the Communist Party in 1935 "to fight for something to eat and clothes and shelter" rather than in dissatisfaction with democracy. Such testimony did not constitute "the kind of meaningful association" required by the statute, Frankfurter wrote for the majority. Harlan, Burton, Clark and Whittaker dissented claiming that the Court "took impermissible liberties with the statute and the record."

NLRB v. District 50, 355 U.S. 453, in which a unanimous Court found that the Board exceeded its allowable discretion because of its "inflexibility" in requiring Board certification as a condition precedent to allowing recognition of a union as exclusive bargaining representative after the employer was found to have committed an unfair labor practice in assisting the union. The Supreme Court also held that the Court of Appeals exceeded permissible limits of judicial review when, as an alternative to the Board certification, it dispensed with the necessity of an election, in effect leaving to the employer and the union, rather than to the Board, the decision when the effect of the unfair labor practice has been eliminated.

NLRB v. Avondale Mills, 357 U.S. 357, in which the majority, through Justice Frankfurter, ruled that "there must be some basis in the actualities of industrial relations" for a Board finding that the enforcement of a valid no-solicitation rule by an employer who is at the same time engaged in anti-union solicitation constitutes an unfair labor practice. No "mechanical answers" will avail. The Court held that the Board should, for example, have adduced evidence bearing on the availability of "relevant alternative channels" for communications on the right to organize. Warren's dissent in *Avondale* charged the majority with reversing the Board "on the very sort of issues that are within its special competence."

Public Service Commission of Utah v. U.S., 356 U.S. 421, and *Chicago, M. St. P. & P. Ry. v. U.S.,* 355 U.S. 300, in which the Court set aside ICC orders increasing intrastate railroad rates found by the ICC to be unjustly discriminatory against interstate

rates. In both cases, the Court held that there was not substantial evidence to support the agency's findings. Brennan in the *Chicago* case maintained that the deficit from a single commuter operation could not be adjudged an undue discrimination against interstate operations "without findings which take the deficit into account in the light of the carrier's other intrastate revenues from Illinois traffic, freight and passenger." Clark, in the *Utah* case, held that the ICC failed to follow the Court's decision in *Chicago* and did not concern itself "with the revenues derived from, or the conditions incident to, intrastate passenger operations." There should have been a showing, among other evidence, of comparative costs of performing the interstate and intrastate services. "Rate uniformity is not necessarily the goal of federal regulation, nor can the Commission's wishful thinking be substituted for substantial evidence," Clark concluded. The *Chicago* decision was unanimous; but Frankfurter, Burton, Harlan and Whittaker dissented in *Utah* on the ground that "practicalities of administration" make it impossible accurately to segregate costs between interstate and intrastate commerce. There is need, said Frankfurter, for a solution "that accommodates imponderables and does not demand precision where the nature of the subject can yield only approximations."

Schaffer Transportation Co. v. U.S., 355 U.S. 83, in which the Court set aside and remanded the ICC's denial of a certificate to a motor carrier because of the Commission's failure to evaluate alleged benefits to the public from the motor carrier's proposed service between points served exclusively by rail and its failure to disclose the factors the Commission compared in concluding that existing rail service is "reasonably adequate." Frankfurter entered a lone dissent, contending that since the standards of the national transportation policy of Congress are not "mechanical" or "self-defining," they "inevitably imply the widest areas for judgment to be exercised" by the Commission. Nonetheless, he felt the Court's decision might serve a useful purpose if it leads the Commission to "a more detailed and illuminating formulation" of the reasons for its judgments.

A question of basic significance was raised but not answered in *Boston and Maine RR. v. U.S.*, 358 U.S. 68, when the ICC in a memorandum to the Supreme Court agreed to proceed in accordance with the terms of the Court of Appeals' remand calling for consideration of the mileage factor before Commission approval

of per diem rates for freight car hire. The question of basic significance was whether the ICC, relying on the power to issue declaratory orders granted by Paragraph 5(d) of the APA, has adjudicatory jurisdiction to determine a rate of uniform application throughout the industry or whether it must engage in a "full scale investigation" pursuant to its rule making authority under Paragraph 1(14)(a) of the Interstate Commerce Act. The per curiam opinion ruled the question premature, since the proceedings on remand might lose the characteristics of a 5(d) declaration.

IV. Procedures "of record" as a check on potential administrative excess

The significance of promulgation of agency rules and procedures as a matter of public record was demonstrated clearly in *Vitarelli v. Seaton,* — U.S. —, 27 Law Week 4347, in which the justices agreed unanimously that an "executive agency must be rigorously held to the standards by which it professes its action to be judged." Four of the justices, Frankfurter, Clark, Whittaker and Stewart, dissented from the Court's conclusion that the Interior Department's second discharge notification to Vitarelli was not an effective exercise of its summary removal power; but this did not detract from the unanimity on the point that failure of the Department to follow its own procedural rules in dismissing Vitarelli, even though those specific rules were gratuitous and not required by statute or Presidential order, invalidated the discharge.

The Court did not reach the question of constitutional permissibility of an administrative adjudication based on "confidential information" not disclosed to the employee. Harlan stressed, however, that "in proceedings of this nature in which the ordinary rules of evidence do not apply, in which matters involving the disclosure of confidential information are withheld, and where it must be recognized that counsel is under practical constraints in the making of objections and in the tactical handling of his case which would not obtain in a cause being tried in a court of law before trained judges, scrupulous observance of departmental procedural safeguards is clearly of particular importance."

Similar strictness in holding an agency to the letter of its promulgated rules and procedures was applied by the Court of Appeals for the Third Circuit in holding that a Treasury Department order delegating to the Commissioner of Internal Revenue authority "to

approve all personnel actions effecting appointments, reinstatements, promotions and transfers" did not give the Commissioner authority to discharge employees. *Zirin v. McGinnes,* — F. 2d —, 27 Law Week 2645.

The *Vitarelli* case and the earlier *Service* case, 354 U.S. 363, are proof of the protection to the individual that stems from putting agency procedures "on the record." They are effective reminders to lawyers that support of projects to eliminate unnecessary governmental secrecy and to enhance the publication of agency rules and procedures may do more to protect their clients' rights than years of protracted litigation.

Conclusion

Justice Frankfurter's advice to governmental agencies in the *Local 1976* case, 357 U.S. 93, in which he cautioned them not to assume "as a fixed and universal rule" what a particular agency "may prefer to develop in a more cautious and pragmatic manner through case-by-case adjudication," might well be applied by lawyers with regard to evaluation of the Supreme Court's image of administrative regulation.

The decisions of the past two terms in the administrative sphere embody the Court's respect for agency expertise, flexibility, and representation of the public interest. Its "hospitable" attitude toward the processes and substance of agency decision-making was shown clearly in key cases like *Fant, Moog, Mandel, Frisco Transportation, Simplicity, Darlington,* and *Panama Canal,* among others. Even in cases not calling for judicial evaluation of particular agency practices, like *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, one finds the Court, in determining that the States must defer to national labor policy, paying tribute to the "specialized knowledge," "cumulative experience," and "exclusive competence" of an agency.

Hospitality is not the equivalent of blind enthusiasm, however; and opinions like those in *Greene, Harmon, Leedom, District 50, Schaffer Transportation,* and *Atlantic Refining v. New York Public Service Comm.* demonstrated the Court's concerns that the right to judicial review be retained, that there be adequate authorization for administrative action, and that particular actions be supported in fact by the agency's expertise, flexibility, and representation of the public interest.

While one might wish for greater uniformity in the judges' constructions of concepts like "primary jurisdiction," the Court's current tendency to avoid doctrinal formalism and, instead, to seek the effective blending of judicial and administrative strengths, as in *Southwestern Sugar,* and to probe the realities of regulatory action, as in *New York Public Service,* contains potential benefits that outweigh the dangers of conceptual eclecticism. The Court's principal apparent rigidity—holding an agency rigorously to its declared procedures, as in *Vitarelli*—is one that can help achieve fairness and certainty in administrative regulation without limiting the agencies' discretion in formulating policies.

REPORT OF THE COMMITTEE ON AGENCY RULE-MAKING

I. Responses to Dawson Committee on Government Operations.

In large part the Committee on Agency Rule-Making has been concerned with the agency responses to the questionnaire submitted by the Dawson Committee, i.e., the Committee on Government Operations of the House. Those responses total some 2100 pages. Reports were submitted by our Committee on the following responses:

National Labor Relations Board
National Mediation Board
Railroad Retirement Board
United States Tariff Commission
General Accounting Office
Civil Service Commission
Tennessee Valley Authority
Foreign Claims Settlement Commission
Export-Import Bank
United States Information Agency
Advisory Committee for Aeronautics
Indian Claims Commission
Civil Defense Administration
General Services Administration
Food & Drug Administration
Department of Labor

The Chairman acknowledges with pleasure the valuable aid of Professor Cornelius J. Peck in preparing reports on the NLRB, National Mediation Board, Railroad Retirement Board and Department of Labor, of Edwin G. Martin in preparing the Tariff Commission report, and of Glen B. Law in preparing the Civil Defense Administration and General Services Administration reports. The oddly-assorted group of memoranda results from the fact that after the major agencies were assigned to committee members the Chairman undertook to report on the odds and ends that remained. A report on any Department or major agency such as the Federal Trade Commission involves so much study and labor as to counsel that our successor committee should either

enlist the aid of the appropriate sister committee which has jurisdiction of, for example, the State Department or the Treasury Department, or seek a grant from some foundation such as the Ford Foundation, for employment of a number of law school professors to undertake the remainder—i.e., the vast bulk of the task. If the latter course is chosen, it would be desirable to canvass the judicial review provisions as well. Distribution of the project among our own special Committees will enlist the specialists in each field, no mean advantage, but we should not close our eyes to the fact that a very considerable labor is involved.

On the basis of the reports thus far submitted, a number of conclusions may be drawn:

(1) There are 42 wholly-owned government corporations, ranging from Commodity Credit Corporation through Reconstruction Finance Corporation, Federal Public Housing Authority to Tennessee Valley Authority. We are agreed that they are "agencies" within the definition in section 2 of the APA, but suggest a clarifying note in the legislative history of the ABA Code to put the matter beyond challenge.

Some corporations are expressly authorized to adopt rules and regulations, some are not; some issue rules despite lack of an express authorization; some issue no rules though authorized to do so. So sweeping is the scope of the various functions confided to these corporations that we suggest for interpolation in the Code an express authorization to make rules and regulations respecting their procedure, policies and implementation of the statutes under which they operate.

This provision might be made applicable to all agencies in order to make certain that each agency has rule-making power within the compass of the substantive statute administered by it.[1]

(2) A grant of rule-making power by no means assures that the power will be exercised. We suggest for interpolation in the ABA Code a provision requiring all agencies to spell out the criteria which guide them in the exercise of their powers in order to assure that the rule-making power will be exercised for the benefit of the public.

In *Palisades Citizens Assn. v. Weakly* (D. C. Cir. No. 14703,

[1] Compare section 12, APA: "Every agency is granted all authority necessary to comply with the requirements of *this* Act through the issuance of rules or otherwise." Cf. section 1011(a) of ABA Code: "authority to make and embrace rules *thereunder*." The suggested amendments might well be added to section 1011(a).

March 19, 1959) Judge Burger, concurring, took the Alcoholic Beverage Control Board to task for its

> "lack of adequate rules and regulations which are required by the statute"

and added

> "without regulations prescribing procedure and forms, a citizen who wishes to exercise his right to object is at a loss as to how he must proceed."

We believe it no less important that guide-lines which the administrators employ in administering a statute should also be published in such form.[2] Such a provision will provide an impetus to the issuance of interpretative rules and statements of policy. Quere whether it is desirable to take similar action with respect to procedural rules.

(3) How shall we deal with existing guide-lines, interpretations which have been formulated over the years? The SEC, for example, has a "bible" of interpretations for each statute that it administers which is virtually as comprehensive a gloss on the respective statutes as the commentary on the NIL. Plainly it would be of great help to the public to be apprised of such interpretations; it would cut down solicitations of advice from the SEC; and it would insure consistency of interpretation and lack of discrimination. The same situation obtains in other agencies. General Services Administration reported it would make such a "bible" available to the public. Though the task of "codification" is formidable and probably expensive, we consider that it is worth undertaking and recommend it to the consideration of the Council.

(4) Section 4 of the APA excepts "any matter relating to agency management." The Attorney General's Manual states that internal management is not confined to "intra-agency only." The ABA Code, section 1003(f), exempts "internal management . . . of *the* agency." Generally speaking, the overall internal management does not seem to require public participation in rule-making any more than that of a particular agency. Mr. J. D. Bond dissents. Mr. Curtis C. Williams, Jr. agrees, but emphasizes that the broadened exemption should be restricted to "house-keeping" matters, excluding matters of "major policy." Mr. Cornelius J. Peck points

[2] Section 4 of the APA exempts interpretive rule-making but that exemption has been omitted in section 1103 of the ABA Code.

to the possibility of inter-agency agreements settling possible conflicts between their respective jurisdictions. I concur with Mr. Williams and recommend that inter-agency management be exempted from rule-making only to the extent that it is confined to "house-keeping" matters. But quere whether agencies should be compelled to disclose referrals for prosecution, recommendations for certiorari and the like. Why should not the consultation of an agency with its "lawyer" be entitled to privacy?

(5) To the extent that the auditing functions of the General Accounting Office impinge upon private contractors, the question arises whether GAO should issue rules clarifying its audit functions. I have been advised that each audit poses its own particular problem that it is not feasible to lay down rules governing audits. Two Committee members have voted against such rules, one for. The issue lies in an area in which I have no competence and therefore express no opinion.

(6) Given judicial review de novo of informal administrative proceedings, as in the General Accounting Office, is there a need for procedural and interpretive rules? The Committee, believes that there is not much to be gained in these circumstances by insisting on the promulgation of rules. Mr. Williams suggests that the need for de novo review might be curtailed considerably if there were codified administrative interpretation and proof that the agency consistently observed its own prior holdings. We earlier recommended codification of existing interpretations. The availability of de novo trial assures complete protection and one who desires may, as in the case of GAO, dispense with the administrative process and go immediately into court.

(7) The Committee considers that Civil Service Commission rule-making proceedings which affect the interests of federal employees should be open to participation by them. By participation we mean the privilege of submitting their views and of criticizing comments submitted by others, which is presently available to the public in rule-making proceedings. The ultimate decision of what the rule shall be, here as elsewhere, is of course, for the agency.

Mr. Gerald Levenberg is concerned over participation by "upwards of two million employees of the Government." Possible participation by 170,000,000 Americans in other rule-making would be even more disturbing—were each to participate. He likewise dissents on the ground there is no evidence that rules

promulgated in the absence of the Civil Service employees are arbitrary. But we do not require such evidence in other rule-making. The underlying premise is that the rights of interested parties will be safeguarded if they can be heard to present their views.

The Committee recommends that the exemption for matters of internal management should be qualified to permit said employee participation.

(8) We consider that the investigations by the Tariff Commission for purposes of purely informational reports to the Congress and President do not constitute rule-making.

The Tariff Commission, however, conducts certain investigations, which though "advisory" in form, more or less constitute the basis for action by the President. The only available hearings are those before the Commission, and we consider that since the changes in tariff rates involved, constitute rule-making although the Commission itself does not promulgate an "effective" rule, final action being left to the President, the definition of rule should be amended to embrace this situation.

In some situations the report by the Commission to the President is not published until after he has acted upon it. We recommend a requirement that a report be published when delivered to the President. Such publication throws the hot light of publicity on undercover maneuvers which seek to influence the ultimate presidential judgment.

(9) In its proceedings, the Tariff Commission does not disclose to interested parties, statistical and other business data for which a complainant requests confidential treatment, even though they do not amount to "trade secrets." This practice was criticized by the Attorney General's Committee in 1941. With the Horsky Committee in 1955 (D. C. Bar Assn.) we believe that participants should be apprised of the contentions of others so that they may meet them and aid the rule-making body in reaching a sound result and that confidential treatment should be limited to "trade secrets" or the national security. Mr. Edwin G. Martin dissents with respect to such limitations of confidential treatment.

(10) From the emphasis placed by a number of agencies upon the fact that they have no "regulatory" functions, e.g., United States Information Agency, General Accounting Office and Foreign Claims Settlement Commission, it may appear that they do not regard the Administrative Procedure Act as applicable. But the

test of an agency under section 2(a) of the APA is whether it is an "authority" of the United States, not whether it "regulates the public at large." Strict compliance with the APA on the part of the Foreign Claims Settlement Commission is required if only because 22 U.S.C., section 1623 (j) provides that

> "The Commission shall comply with the provisions of the Administrative Procedure Act of 1946, except as otherwise specifically provided by this chapter."

(11) Although the NLRB performs adjudicatory functions, the mass of cases of which it disposes, though issued in the form of an adjudication, generates pressure to codify its substantive rules if only to avoid an increase in its case load by stating the full implications of departures from former precedents, even though unnecessary to disposition of the immediate case.

Recognizing that the Board—and the courts—have had to proceed for a time on a case-to-case basis in formulating, for example, the jurisdictional boundaries of "commerce," the Board by inviting public participation in formulating jurisdictional boundaries, by issuing press releases with respect to its jurisdictional policies has in fact engaged in rule-making. We believe this to be desirable but recommend that there be full compliance with the rule-making provisions of the APA.

(12) The National Mediation Board, which administers the Railway Labor Act is appointed by the President and therefore falls outside the APA section 2 exemption for "agencies composed of representatives of the parties . . . to the disputes determined by them." Mediation functions are not excluded from the rule-making provisions of the ABA Code.

The Board we are told must enjoy the complete confidence of all parties to disputes if it is to perform its mediation function successfully. This should operate to insure fair procedures. Mediatory functions require flexibility whereas formalization of procedures may invite disappointed participants to seek judicial remedies in reliance on technicalities, thereby diverting resolution of issues from collective bargaining, upon which the Railway Labor Act primarily relies. Against this background, the question is posed whether such mediatory functions should be exempted from rule-making requirements.

(13) In part composed of representatives of parties to disputes, the Railway Retirement Board is exempt from the definition of

agency in APA section 2(a). But the "agency" definition in the ABA Code is framed in terms of "arbitration and mediation functions." To avoid doubts whether agencies such as the Board are thus exempted, we suggest that the legislative history of the Code show this plainly.

Virtually all of the Board's rules, it states, in some way involve the payment of benefits. Does the APA section 4 exemption for matters relating to "public property . . . benefits . . ." govern? The "benefits" language, subject to a finding of delay or expense, is also in the ABA Code. Since the claims asserted under the Act are not paid out of general public funds but are accumulated by special taxes levied on the employers and employees we recommend that the legislative history of section 1003(f) of the ABA Code make plain that the "benefits" exemption does not embrace tax funds levied for "benefits" purposes upon private persons.

(14) The section 4 exemption for military and foreign affairs functions does not, in our judgment, extend to the purchase by General Services Administration of "common use civilian items" required by those functions. The military function exemption is for "defense functions." That of "foreign affairs" is aimed at rule making which "would clearly provoke definitely undesirable international consequences." The disposal of surplus strategic and critical materials needs to be viewed in the same perspective.

(15) Further study should be directed to whether resort to special industry advisory committees achieves representation of all the interests upon which rule-making impinges.

II. Miscellaneous

(1) We recommend that every agency should publish its rules and regulations in juxtaposition to the specific statutory provision which they designed to implement both in pamphlet form and in the Federal Code of Regulations. Food & Drug Administration publishes a pamphlet of statute and relevant regulations in this form.

(2) In 1955, the Horsky Committee on Agency Rule Making of the Administrative Law Section, District of Columbia Bar, made recommendations, some of which are now embodied in the ABA Code. We recommend adoption of said Committee's recommendation that comments made by other persons on proposed rule changes be made available to interested persons, and that the

somewhat equivocal language of the ABA Code be clarified on this score. Such comments should be made available to the maximum extent consistent with national security and, said the Horsky Committee, confidential treatment should be accorded "trade" secrets only upon a clear showing that they should be kept confidential. A similar "clear" showing should be required for confidential treatment of comments by sister agencies. We concur in those recommendations.

(3) The Council referred to our Committee the report of the Communications Committee respecting the "Owensboro" problem—10 Ad. Law Bull. 129, 132-135. In sum, counter-proposals for rules contained in comments filed with the Federal Communications Commission are not published in the *Federal Register*. In consequence, it is possible that a party who may be affected by a channel shift proposed in such comment may not learn of the proceeding. We do not concur in the Communications Committee's suggestion that such publication is presently required by APA section 4. And the subsequent decision in the *Owensboro* case, 262 F. (2d) 702 (D.C. Cir.) seems inhospitable to that suggestion. Since the problem is largely confined to the FCC, we suggest a legislative solution tailored for it.

Such legislation might provide a cut-off date for submission of counter-proposals, publication thereafter of the subject matter of such counter-proposals with a short period for filing comments (but not additional counter-proposals) prior to hearing, excluding from Commission consideration any unpublished new subject matter.

But we recommend that the shift or award of a particular channel to a particular person be cast in the form of "adjudication" rather than rule making. Under the ABA Code rule-making is limited to statements of "general applicability," and we believe that adjudicatory proceedings are better suited than rule-making to the protection of conflicting interests.

RAOUL BERGER, *Chairman*

REPORT OF THE COMMITTEE ON AGENCY-SECTION LIAISON

This Committee, newly created early in 1958, has two facets. The first represents a service that the Committee can perform for the other Committees of the Section in establishing and maintaining liaison with the agencies of Government. The second involves the work that can be done between this Committee of the Section and the agencies of Government in seeking improvements in the administrative process.

Both facets are furthered by the fact that the Committee has co-chairmen, one from Government and the other from private practice, and that its members are either the general counsels of Government agencies or their representatives.

As to the first line of endeavor, liaison has been established and maintained but there has been little further activity with Section Committees. Notably, however, the committee on "bibliography of source material on agency practice" has indicated that it wishes the close cooperation of this Committee.

As to the second line of endeavor, the Committee used the Section's First Institute on Practical Problems as an occasion and as source material for considering in the Committee work on improvement of agency practices and procedures in particular fields, on greater uniformity where feasible, and on methods to publicize agency practices and to mobilize available agency material for practitioners. With the cooperation of the Director of the Office of Administrative Procedure various potential areas of work were explored and it was further agreed that work could well be undertaken in cooperation with the agencies' committee of general counsels.

Both lines of endeavor hold considerable promise and should be pursued vigorously.

Hans A. Klagsbrunn
Willard W. Gatchell
Co-chairmen

REPORT OF THE COMMITTEE ON AGRICULTURE

The activity of the Committee on Agriculture this year was confined to an informal consideration of the provisions of S. 1070, "Code of Federal Administrative Procedure" and S. 600, "Federal Administrative Practice Act."

This Committee recognizes and appreciates the fact that in the course of the development of the proposed legislation by the special Committees on Legal Services and Practices significant improvements have been made in these bills. Although this Committee does not oppose the underlying objectives of such proposals it is of the opinion that certain provisions thereof, if enacted, will present serious problems in specific areas of administrative action.

JAMES A. DOYLE, *Chairman*

REPORT OF THE COMMUNICATIONS COMMITTEE

The Committee on Communications met five times during the 1958-1959 period. Its sole recommendation for Section action is that the Section support the enactment of S. 1898, which would amend Section 309 of the Communications Act to substitute a pre-grant hearing procedure for the present protest procedure and would amend Section 405 of the Communications Act to require the Commission to take action within 90 days of the filing of a petition for rehearing of any grant made initially without hearing.

Since notice is essential for an effective pre-grant procedure, under the proposed pre-grant procedure the Commission may not grant an application in the broadcast and common carrier services, or an application within certain limited categories in the safety and special services, for 30 days following issuance of public notice by the Commission of acceptance for filing of such an application or any substantial amendment thereof, except for minor types of applications. Prior to the day the Commission grants an application or designates it for hearing, any party in interest may file a petition to deny. Factual allegations of the petition must be supported by affidavit of a person with personal knowledge thereof. The applicant may reply and must support any factual allegations in such reply by similar affidavit. The Commission may hold oral argument, if it deems oral argument appropriate, after which it shall (1) grant the application, deny the petition and issue a concise statement of the reasons for denial disposing of each substantial question presented or (2) designate the application for hearing in accordance with procedures similar to those of the present statute.

This Committee supports the enactment of S. 1898 to eliminate defects of the protest procedure and to strengthen the remedy of the petition for rehearing in cases of grants made without hearing. The post-grant protest procedure gives the Commission little discretion to dispose summarily of protests that are without substantial merit and have resulted in lengthy and often pointless delays in service to the public. The post-grant protest also reverses the usual administrative procedure; the proper and effective time for the Commission to consider objections to a grant is before rather

than after it acts. The protest does not permit parties to obtain timely and adequate consideration by the Commission of substantial objections and, as a practical matter, places upon the protestant the burden of persuading the Commission that its original grant was mistaken. The proposed pre-grant procedure would give the Commission ample discretion to dispose summarily of frivolous objections to a grant, but would require appropriate consideration to substantial objections before grant. The proposed amendment of Section 405 is desirable to ensure that effective consideration of a petition for rehearing of a grant made without a hearing is not prejudiced by indefinite delay during which the grant is allowed to remain in effect.

The bill was drafted and approved by the Federal Communications Bar Association and introduced by Senator Magnuson at its request. The Standing Committee on Communications of the American Bar Association recently voted to recommend to the House of Delegates that the House support the enactment of S. 1898 and voted further that, if the recommendation is accepted, the chairman of the Committee be authorized to arrange for participation in Congressional hearings.

The following subjects were discussed at Committee meetings:

1. *The Matter of Notice in FCC Rule-Making Dockets.* The problem falls within an area of the FCC's responsibility in that counterproposals to rule-making proposals not within the ambit of the original FCC notice and which presently are not required to be brought to the attention of interested parties, probably is contrary to the letter and spirit of Section 4 of the Administrative Procedure Act.

A subcommittee considering the problem in some depth recommends the following language be added as subsection (e) of Section 1.213 of the Commission's rules.

> (e) In television allocations proceedings, the Commission will, when it deems it desirable in the public interest, announce in its published notice of proposed rule making that counterproposals or variant forms of the proposal contained in the notice may be filed as of a certain date, which date shall be in advance of the deadline for comments set forth in the notice. Such counterproposals shall be contained in pleadings bearing the title "Suggested Counterproposal" or "Suggested Counterproposals." No oppositions to such pleadings will be considered unless they are filed within five (5) days of the deadline for the submission of counterproposals. No replies to such oppositions will be con-

sidered. Thereafter, the Commission will, at a date reasonably in advance of the deadline for comments, issue a public notice, to be published in the Federal Register, briefly describing the substance of counterproposals which it wishes to consider in the proceeding as alternatives to the original proposal. The Commission may in its discretion forbid the filing of counterproposals as above described in proceedings where the public interest demands. However, if a counterproposal or variant form of the original proposal is contained in comments, the Commission will not adopt such counterproposal as its final action in the proceeding without first issuing a further notice of proposed rule making, to be published in the Federal Register, inviting comments and reply comments on the counterproposal.

No Committee action was taken on the foregoing recommendation. The 1959-1960 Committee may desire to pursue the matter further.

2. *The Reduction of the Size of Hearing Records before the FCC.* This subject was of considerable interest to the Committee. A beginning, in terms of research, was made and interviews were held with some FCC examiners. The work did not progress far enough to permit the Committee to make or pass on any recommendation at this time. The area is an important one and promises to be one that offers a great opportunity for service to future Committee members.

3. *Legislation.* The Section did not call upon the Committee to devote any attention to any specific legislation. The legislation pending before Congress with which the Committee was familiar and which had some impact on Communications did not come to any public hearing sessions. The Committee did not concern itself with any legislative matters in any way nor did it appear before any legislative body.

4. An area of possible interest to future Committee members was touched upon by the Committee. This subject revolves about acquiring public information from an administrative agency such as the FCC. While it is possible to acquire information (sometimes highly technical and practically unobtainable except from the agency) still there is no legal right to the information spelled out anywhere in the enabling legislation. The query, unresolved by this Committee, is, should the right of the public to such information be clearly stated as a matter of law.

N. E. Jorgensen, *Chairman*

REPORT OF THE COMMITTEE ON FOOD AND DRUGS

The Food Additives Amendment to the Federal Food, Drug and Cosmetic Act was passed by the Congress late in August, 1958 and approved by the President on September 6, 1958. The Bill enacted was H.R. 13254, which became Public Law No. 929, 86th Congress. It added Section 409 to the Act and made changes in other sections of the Act as well. As noted in the report of the Committee on Food and Drugs last year (10 Administrative Law Bulletin (Summer Issue, 1958) 146-47). "The emergence of this legislation . . . marks the culmination of about eight years of struggle with a difficult subject."

The Act as amended provides that a food shall be deemed to be adulterated if it bears or contains an unsafe food additive, and a food additive is deemed to be unsafe unless its use conforms to a regulation issued by the Secretary of Health, Education and Welfare. Any person has standing to file a petition for a food additive regulation, and the Secretary must publish notice of the proposed regulation in general terms within 30 days. Within 90 days (which may be extended to 180 days) the Secretary must by order either establish a regulation or deny the petition; in either event the petitioner must be notified of the reasons for the Secretary's action. The Secretary may also propose a food additive regulation on his own initiative and after 30 days may by order establish a regulation on his proposal.

Within 30 days after publication of an order any person adversely affected thereby may file objections thereto, specifying with particularity and requesting a public hearing on the objections. A public hearing must then be promptly held for the purpose of receiving evidence relevant and material to the issues raised by the objections. As soon as practicable after the hearing the Secretary must by order act upon the objections and make this order public. His order "shall be based upon a fair evaluation of the entire record at such hearing, and shall include a statement setting forth in detail the findings and conclusions upon which the order is based."

In case of actual controversy as to the validity of an order any

person adversely affected thereby may obtain judicial review by filing a petition praying that the order be set aside in whole or in part in the United States Court of Appeals for the circuit wherein he resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia Circuit. The Secretary must then file with the court a transcript of the proceedings and the record on which he based his order. The court will then have "exclusive jurisdiction to affirm or set aside the order complained of in whole or in part." The Act provides that "The findings of the Secretary with respect to questions of fact shall be sustained if based upon a fair evaluation of the entire record at such hearing."

The Act also provides for an application to the court for leave to adduce additional evidence and provides that "the court may order such additional evidence to be taken before the Secretary and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper, if such evidence is material and there were reasonable grounds for failure to adduce such evidence in the proceedings below."

The Food Additives Amendment was enacted without express reference to the Administrative Procedure Act, and a question may thus someday arise as to whether or not it conflicts with the APA. It is certainly arguable, however, that the standards and procedures specified in the Food Additives Amendment actually add to, rather than purport to detract from, the rights afforded by the APA, particularly since the determinations to be made under Section 409 of the Federal Food, Drug and Cosmetic Act seem to fall in the category of rule making rather than adjudication. The Food Additives Amendment is interesting from the standpoint of administrative procedure in several respects. Thus, although rule making is all that is involved, an evidentiary hearing may be had as a matter of right. (The question of who has the burden of proof at the hearing may eventually turn out to be troublesome, however. The Food and Drug Administration will almost certainly contend that the burden of proof and the burden of going forward with the evidence rest on the objectors.) Also, the Secretary is expressly enjoined to "make a fair evaluation of the data" before him and to base his order "upon a fair evaluation of the entire record." Detailed findings of fact are required. The scope and standard of review is spelled out: The Secretary will

prevail on questions of fact if his order is "based upon a fair evaluation of the entire record."

In some respects these features stem from provisions of the Miller Pesticide Chemicals Amendment, which was enacted in 1954 (Public Law No. 518, 83d Cong.) and which added Section 408 to the Act. Section 409, however, does not include the advisory committee procedure provided for in Section 408. Also, Section 409 differs from Section 408 in that it does not limit the class of persons who may institute the rule making proceedings.

The first regulations under the Food Additives Amendment, including procedural regulations, were proposed in the Federal Register for December 9, 1958; the regulations as adopted were published in the Federal Register for March 28, 1959. To date, neither the regulations nor the law itself has been tested. No evidentiary hearings have yet been held, and none appear to be imminent. There are, however, some petitions now pending. For that matter, no evidentiary hearings have yet been held under Section 408, although some use has been made of the advisory committee procedure under Section 408.

It seems an appropriate function for the Committee on Food and Drugs to follow the administration of the food additive law in practice. One of the members of the Committee, acting as a Sub-Committee, has undertaken the task of preparing a questionnaire designed to elicit facts on which conclusions might be drawn as to the most important problems arising under the law. This project had not been completed as of mid-June, and it is hoped that it will continue during the next year.

The Chairman of the Committee was asked by the Chairman of the Committee on Agency Rule Making to consult with him on the various procedural provisions, both in cases of adjudication and of rule making of the Federal Food, Drug and Cosmetic Act. A report on this matter was provided to the Chairman of the Committee on Agency Rule Making.

The members of the Committee have been asked for their views as to the desirability, necessity and feasibility of recommending standards of conduct to rule making on the part of the Food and Drug Administration. Only one Committee member has commented on the proposal, and it was his feeling that while it might be desirable to work out methods for restricting rule making to the areas dictated by legislation, it is not desirable in the case of the Food and Drug Administration to restrict rule making to con-

siderations based on the evidence in hearings. The Chairman agrees generally with this view, primarily because the Act itself prescribes standards for rule making in some important areas of FDA responsibility. There are, however, numerous rule making provisions in the Federal Food, Drug and Cosmetic Act, and it would seem appropriate to consider ways and means of standardizing the rule making procedure at that agency. The Act is now a hodgepodge of procedural provisions for rule making.

EUGENE F. MULLIN, JR., *Chairman*

REPORT OF THE COMMITTEE ON GAS AND ELECTRIC POWER

The principal activity of this Committee during the year involved consideration of a Code of Agency Standards of Conduct. At the suggestion of the Section Chairman, the Committee on Code of Agency-Tribunal Standards of Conduct under the Chairmanship of David W. Peck, Esq., prepared a Code of Conduct in draft form for review by the Section at the Mid-winter Meeting in Chicago. The Code proposed would have banned all ex parte communications and contacts with all agency personnel except as provided by Agency Rule consistent with the Code.

The members of this Committee reviewed the proposed Code at length and unanimously concluded that prohibition of all ex parte agency contacts would impede effective functioning of administrative proceedings in the gas and electric power fields. Attention was called to the necessity for staff audits and staff investigations in which ex parte contacts are made between utility personnel and staff personnel and to the necessity for reviewing and discussing complicated accounting and engineering questions with staff personnel, particularly trained in those fields.

At the Mid-winter Meeting, these views were brought to the attention of the Section Council. At the same time, Donald Beelar proposed a revision of the Peck Committee Code which would restrict the prohibition of ex parte communications to agency decisional personnel and would thus permit continuation of contacts with agency staff members. The Committee members concluded that this modification satisfactorily answered their principal objections to the proposal. Thereafter, a revised bill was approved and this bill was subsequently introduced in Congress as H.R. 6774.

The Committee also worked during the year to establish contacts with the Public Utility Section and to provide a means for transmitting views of the Public Utility Section to the Administrative Law Section on significant matters involving administrative procedure.

W. James MacIntosh, *Chairman*

REPORT OF THE COMMITTEE ON HEARING EXAMINERS

On August 27, 1958, H.R. 13450 (85th Congress) became law (Public Law 85-766) under the provisions of which the Department of Health, Education and Welfare was authorized to appoint Hearing Examiners to hold hearings under the Old-age and Survivors' Insurance provisions of the Social Security Act, as amended, without regard to Section 11 of the Administrative Procedure Act. This authorization was sought by the Department of Health, Education and Welfare on the basis of the large number of cases pending before it, and was requested for a period of one year as an "emergency" measure. Public Law 85-766 authorized the appointment of non-section 11 Hearing Examiners until December 31, 1959. However, under H.R. 6769 (page 32, lines 18 through 25 and page 33, line 1), this authorization would be extended for a period ending December 31, 1960.

The Department's proceedings for which exempt hearing officials are sought involve disputes between a citizen and the Department as to the Department's prior administrative denial of the citizen's claim. The citizen is entitled to a fair hearing before an impartial hearing officer who can exercise independence of judgment. Under the exemption authority authorized in Public Law 85-766 and under H.R. 6769, these hearings come before subordinate employees of the Department and the Department employer is, in effect, a judge in its own behalf. This is a reversal of the doctrine of "fair play," and reverses the gains made by the adoption of the Administrative Procedure Act. It is believed that in the time since the adoption of Public Law 85-766, the Department could have and should have worked out appropriate procedures for the appointment of temporary trial examiners under the basic safeguards provided for in the Administrative Procedure Act. Pursuant to the request of the Chairman of the Section of Administrative Law, this Committee drafted and sent over the signature of the Chairman, a letter addressed to the Chairmen of the Subcommittees of the Appropriations Committee, Departments of Labor and Health, Education and Welfare of the Senate and House of Representatives opposing the passage of H.R. 6769

in so far as that Bill seeks to extend the period of authorization to the Department of Health, Education and Welfare for the employment of Hearing Examiners without regard to the Administrative Procedure Act.

This Committee investigated and studied the proposals of the National Labor Relations Board and the Department of Health, Education and Welfare pending before the United States Civil Service Commission to organize these respective Agencies so as to provide, in the case of the National Labor Relations Board, for the establishment of a Director or Administrator, and in the case of the Department of Health, Education and Welfare, for the establishment of regional representatives, to supervise the operations of their Hearing Examiners. The job descriptions of these proposed Hearing Examiner supervisors indicate clearly that an unwarranted interference with the independence of Hearing Examiners in their decisional duties would inevitably result. The Committee concluded that such organization would constitute, in the case of both proposals, a violation of the spirit and intent of the Administrative Procedure Act, and in addition, the plan for the National Labor Relations Board would appear to violate Section 4(a) of the Taft-Hartley Act. In view of the obvious need for immediate action, and in order to preserve the gains made by the adoption of the Administrative Procedure Act, this Committee drafted, for the signature of the Chairman of the Section of Administrative Law, a letter to the Chairman of the United States Civil Service Commission, opposing these plans. It suggested also that copies of such letter be sent to appropriate Committees of the Congress.

On April 27, 1959, the Committee received a letter from Hon. Jack Brooks, Member of Congress and Chairman of the Government Activities Subcommittee of the Committee on Government Operations of the House of Representatives, which invited attention to two problems having to do with the employment and retention of Hearing Examiners under the Administrative Procedure Act, concerning which Congressman Brooks requested an expression of American Bar Association position.

The first problem involved the increase in the number of agencies which have made agreements with the Civil Service Commission for what is known as selective certification of Hearing Examiner positions. The second problem involved the retention of Hearing Examiners who have been or who are about to be dis-

charged as a result of a reduction in force in an Agency. Since the selective certification agreements apply to all appointments of Hearing Examiner positions in the Agencies involved, "riffed" Examiners who do not have the required specialized experience are unable to fill Hearing Examiner positions in those Agencies despite the fact that they have had years of successful experience as Hearing Examiners and may be at the top of the general register. Attached to the Congressman's letter was a communication from the Chairman of the Civil Service Commission from which it appears that once a selective agreement has been approved it must be applied to all Hearing Examiner positions in the Agency including not only selections from the register, but promotions, transfers and reinstatements as well "as long as there are persons available with the required specialized background." Also, attached to the Congressman's letter was a statement supplied by the Civil Service Commission as to loans under the Administrative Procedure Act of Examiners to Agencies insufficiently staffed. This statement indicates that a large amount of borrowing of Hearing Examiners was done by Agencies under the Administrative Procedure Act and the Congressman points out that this large scale borrowing seems to be inconsistent with both the original selective certification requirement and its application to "riffed" Hearing Examiners.

An identical letter was sent by Congressman Brooks to the Chairman of the Administrative Law Section who requested this Committee to respond to both letters. Such response was made by this Committee by letter dated May 18, 1959, the gist of which was that we believe general or selective certification practices to be inconsistent with the legislative mandate of Section 11 of the Administrative Procedure Act which requires independent appointment and tenure of Federal Hearing Officers and that in so far as these practices are permitted by the Civil Service Commission they would be eliminated entirely by the passage of Titles I and II of S. 600 and H.R. 7092, now pending before the Congress (identical with S. 932 and H.R. 3350 in the 85th Congress) under which there would be created an Office of Federal Administrative Practice and Hearing Examiners would be taken from under the jurisdiction of the Civil Service Commission and placed under the direction and supervision of such Office; that pending passage of this legislation, the Administrative Law Section, in order to preserve the gains made by the adoption of the Administrative Procedure Act,

opposes on behalf of the American Bar Association, these general and special selective certification practices of the Civil Service Commission as being contrary to the spirit and intendment of Section 11 of the Administrative Procedure Act.

This Committee has also continued to render informal assistance to the Committee on Office of Federal Administrative Practice Act in connection with the presentation to the Congress, to members of the Bar and to local Bar Associations of arguments and data in support of the Federal Administrative Practice Act (S. 600 and H.R. 7092).

FANNEY N. LITVIN, *Chairman*

Committee Member C. B. Heinemann, Jr. objects to the action of the Committee with respect to the Department of Health, Education and Welfare as shown in paragraph 1, page 294, et seq, of this report because in his opinion the job description referred to therein for regional representatives of the Department does not permit interference with independence of hearing examiners.

REPORT OF THE COMMITTEE ON IMMIGRATION AND NATIONALITY

I. *Resolutions presented for approval:*

No. 1. "*Resolved,* That the Section of Administrative Law recommends that the House of Delegates adopt the following resolution:

'That it is the opinion of the American Bar Association that the immigration and nationality laws of the United States be amended to provide for a 10-year statute of limitations within which proceedings for deportation must be instituted, except that the statute of limitations shall not apply to proceedings for deportation based upon an admission of, or conviction for, a crime which is not subject to a statute of limitations under § 3281 of Title 18 of the United States Code, and

'That the Section of Administrative Law be authorized and directed to advance appropriate legislation to that end and take such other steps as it deems appropriate to carry out this resolution'."

No. 2. "*Resolved,* That the Section of Administrative Law recommends that the House of Delegates adopt the following resolutions:

(a) WHEREAS, Advance notice of deportation is not given to aliens in all cases, notwithstanding that many such aliens have been long-time residents of the United States with close family ties and with American business interests; and

WHEREAS, Such advance notice was uniformly granted to aliens prior to 1952, in order to permit them to wind up their affairs,

Be It Resolved, That it is the opinion of the American Bar Association that fourteen days advance notice of deportation be granted to all aliens except those who may waive such notice.

(b) WHEREAS, Stays of deportation are not uniformly granted administratively pending judicial review of immigration cases and cases are thereby rendered moot prior to trial, and whereas the Attorney General has accepted the principle of automatic stays pending litigation, by sponsoring legislation to that effect,

Be It Resolved, That the service of a complaint or other action seeking review of an immigration case shall stay the deportation of an alien pending determination of the case, unless previous ac-

tion has been brought and denied for the same relief or unless the court otherwise directs."

No. 3. "*Resolved,* That the Section of Administrative Law recommends that the House of Delegates adopt the following resolution:

'WHEREAS, The Board of Immigration Appeals is the judicial arm of the Attorney General in immigration and citizenship matters and whereas there is presently a lack of uniformity in providing for appeals to the Board in all cases involving adjudication;

Be It Resolved, That the American Bar Association is of the opinion that final administrative appeals should lie to the Board of Immigration Appeals from all decisions of district directors, regional commissioners and special inquiry officers under the Immigration and Nationality Laws; and

That the Section of Administrative Law be authorized and directed to advance appropriate legislation to that end and take such other steps as it deems appropriate to carry out this resolution.' "

A. DISCUSSION OF RESOLUTIONS

No. 1. *Statute of Limitations in Deportation*

The Committee on Immigration and Nationality resubmits for approval a modified draft of a resolution providing a ten-year statute of limitations applicable only in deportation cases. This resolution is amended to exclude from the proposed statute of limitations all deportation offenses for which the death penalty may be imposed pursuant to 18 U.S.C. 3281.[1]

A previous resolution of this Committee included a ten-year statute on all denaturalization cases, including those involving

[1] Federal offenses for which the death penalty may be imposed pursuant to 18 U.S.C. 3281 are:

(a) Murder in the first degree (18 U.S.C. 1111)

(b) Atomic Energy Act violations and conspiracy to commit such violations (42 U.S.C. 1810 and 1816)

(c) Robbery of a bank or savings and loan association resulting in the death or kidnapping of a person (18 U.S.C. 2113(e))

(d) Committing or attempting to commit espionage and conspiring so to do (18 U.S.C. 794)

(e) Kidnapping, if the victim has not been liberated unharmed, and conspiring so to do (18 U.S.C. 1201(a))

(f) Killing certain federal officers and employees (18 U.S.C. 1114)

(g) Rape within the special maritime and territorial jurisdiction of the United States (18 U.S.C. 2031)

(h) Train wrecking which results in the death of any person (18 U.S.C. 1992)

(i) Treason (18 U.S.C. 2381)

fraud. Objection was raised that such a proposal would prevent the denaturalization of Frank Costello. See *U.S. v. Costello,* 171 F. Supp. 10 (S.D. N.Y. 1959). The Committee is now giving further study to a limitations statute in denaturalization proceedings and has omitted such subject from the present resolution. The present proposal, therefore, relates solely to deportation cases, and at the suggestion of the Board of Governors includes the text of proposed legislation to effectuate the resolution.

The Immigration and Nationality Act of 1952 contains no statute of limitations concerning the period within which proceedings for deportation may be instituted. For 65 years prior to the 1952 act, the immigration law had a statute of limitations on deportation, and no showing has been made of the need to depart from this 65-year practice.

Present Situation

1. For 65 years prior to the 1952 Law there had been a statute of limitations on deportation proceedings. From 1917, there was a general five-year period of limitations for bringing deportation proceedings after improper entry, except for

(a) deportable offenses committed in the United States;
(b) subversive aliens; and
(c) entry in violation of quota requirements or with improper visa.

2. Under the 1952 Act, all statutes of limitations are eliminated, and deportation proceedings can be brought at any time, no matter how remote from the improper entry. (8 U.S.C. 1251)

(a) Although there is no period of limitations whatsoever for bringing deportation proceedings, in three instances the statute specifies that the ground of deportation must have occurred "within five years after entry": institutionalization at public expense for mental diseases [8 U.S.C. 1251(a)(3)], public charge [8 U.S.C. 1251(a)(8)], conviction of violations of the provisions of Title I of the Alien Registrations Act of 1940 [8 U.S.C. 1251(a)(15)].

(b) The 1952 Act retroactively eliminated previous statutes of limitations, [8 U.S.C. 1251(d)].

Purpose and Operation of Statutes of Limitations

1. Statutes of limitations have a two-fold purpose, to protect innocent persons from prosecution of claims at a time when evidence

in defense is not available, and to spare the courts from litigation of stale claims "after memories have faded, witnesses died or disappeared, and evidence lost." *Chase Securities Corp. v. Donaldson* 325 U.S. 304, 314 (1944).

2. Under the Federal criminal law, a general five-year statute of limitations is applicable to crimes not punishable by death, 18 U.S.C. § 3282. Arson, robbery, burglary, forgery, white slave traffic, assault with a deadly weapon, and larceny are punishable only if proceedings are instituted within 5-years.

3. Likewise, civil actions are subject to statutes of limitations for conspiracy to establish a totalitarian dictatorship in the United States under foreign domination or control.

5. Under the Federal criminal law, fraudulent procurement of citizenship or naturalization is subject to a 10-year statute of limitations. [18 U.S.C. § 3291]

Rationale for Present Law

The major report of the Senate Judiciary Committee leading to the enactment of the 1952 law, justified the present provisions as follows:

> "It is the recommendation of the subcommittee that the time limitation on the deportation after entry should be eliminated. If the cause for exclusion existed at the time of entry, it is believed that such aliens are just as undesirable at any subsequent time as they are within the five years after entry . . . all aliens who become public charges at any time after entry . . . should be subject to deportation at any time . . ." (Sen. Rep. No. 1515, 81st Cong., 2nd Sess., pp. 389-390).

President's Position

On April 6, 1953, President Eisenhower wrote to Senator Watkins, Chairman of the Immigration Subcommittee of the Senate Judiciary Committee, in connection with proposed hearings. The President said, in part:

> "In the state of the Union message I pointed out that existing legislation contains injustices. Among the administrative provisions of the law which it is claimed may operate with unwarranted harshness are the following: . . .
>
> 8. Deportation provisions that permit an alien to be deported at any time after entry irrespective of how long ago he was in-

volved, after entry, in any action or affiliation designated as 'subversive' . . ."

Congressional Recommendations

The House Committee on Immigration, 79th Cong., 1st Sess., H. Rep. No. 1312, p. 16, recommended a 10-year statute of limitations on deportation under the 1924 Immigration Act.

In the 85th Congress, 1st Sess., Senators Ives, Javits, Saltonstall, Smith (of New Jersey) and Case (of New Jersey) introduced S. 836 which provided in part as follows:

> "Sec. 294. No alien shall be deported by reason of any conduct occurring more than ten years prior to the institution of deportation proceedings."

Senator Javits has advised members of our committee that this bill will be reintroduced in the present session of Congress.

Recommendation of Presidential Commission

The President's Commission on Immigration and Naturalization in its 1953 report, had the following to say as to periods of limitation on deportation:

> "That it is wrong to keep the threat of punishment indefinitely over the head of one who breaks the law is a principle deeply rooted in the ancient traditions of our legal system. The law requires that criminal prosecutions, except for capital offenses, such as murder and treason, be brought within a fixed period of time or not at all. A similar dispensation governs the enforcement of civil liabilities . . .
>
> Indeed, the 1952 statute retroactively rescinded the limited statute of limitations fixed by previous law. An alien who entered the United States 25 years ago, and whose entry involved a purely technical violation, enjoyed immunity from deportation for the last 20 years. Under the 1952 Act, he is now again subject to deportation. That Act threatens the security of many aliens and their families. Their immunities have been removed, and they may be torn out of their accustomed places in the communities in which they live, no matter how exemplary their conduct over a long period of years . . . the new act actually restores the threat of cruel and inhuman punishment for offences long since forgiven.
>
> This undue severity is underscored by the fact that although prosecutions for aggravated criminal violations of the immigration laws are subject to a 3-year statute of limitations, deportation proceedings for such violations—as well as for infractions which offend no criminal law—are governed by no statute of limitations and may be brought—more than say 20 or 40 years after an alien entered the United States. No one has suggested any sound reason why the purpose of limitations—recognition of the unfairness involved in requiring a person to make a defense long after the event when it is difficult or impossible to assemble witnesses and evidence—does not apply to immigration matters at least with equal force as to prosecutions for serious crimes.

It is said that the existence of a statute of limitations would encourage aliens to enter the United States in violation of the immigration laws. A person who enters or remains in the United States in violation of the immigration laws should be subject to deportation from the United States. But the consequences of such a violation should be enforced against him within a reasonable time. There is a fundamental public purpose which is served by statutes of limitations for crimes and in civil actions. This is just as important an objective of law enforcement as the avoidance of violation of law." [pp. 197-198]

The Commission recommended

"that the immigration statute should provide that a deportation proceeding may not be commenced against any alien more than 10 years after the violation occurred." [pp. 197-198]

Analysis of Situation

After study of this situation, the Committee reached the following conclusions:

1. Persons who have entered the United States illegally should be subject to deportation where proceedings are instituted within a reasonable period of time.

2. The absence of a statute of limitations covering deportation is an undesirable departure from basic principles of law. There is no valid reason for denying to such persons what is basic to our jurisprudence, protection from raking up old and dead issues after a reasonable period of time, after which memories of witnesses have faded, contemporaneous sources of information are no longer available, and the general peace of the community would be unduly upset. Under present law, an alien can be deported for something that took place 50 years ago, even if it were only of a purely minor technical character. This means that people who have lived substantially their entire lives in the United States can be torn away from their families and sent to lands which are utterly foreign to them;

3. There is no showing whatsoever of a need for a change in the 65-year old practice of a statute of limitations for deportation;

4. The failure to provide for a reasonable period of limitations, after which deportation proceedings are based, is unjust, unwarranted, and contrary to the fundamental pattern of American law; and

5. In view of the present pattern of statutes of limitations in Federal law, a strong argument could be advanced for a 5-year statute of limitations for deportation. However, in view of the recommendations by a Congressional Committee and a Presidential Commission for a 10-year period, the Committee recom-

mends a 10-year statute of limitations for instituting deportation proceedings.

Proposed Statute

The Committee on Immigration and Nationality submits for approval the following amendment of 8 U.S.C. 1251:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

That subsection (a) of Section 241 of the Immigration and Nationality Act, as amended [66 Stat. 204; 8 U.S.C. 125(a)], is amended to read as follows:

"At any time after entering the United States, and within ten years following the date upon which grounds for deportation arose, any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who . . ."

Section 2. Add after subsection (e) of Section 241 [66 Stat. 208; 8 U.S.C. 1251(e)] a new subsection (f) as follows:

"(f) The ten year period of limitation provided in subsection (a) of this section shall not apply to a proceeding for deportation based upon an admission of, or conviction for, a crime which is not subject to a statute of limitations under Section 3281 of Title 18 of the United States Code."

RESOLUTION

The Committee on Immigration and Nationality adopted, and submits for approval, the above resolution and draft of legislation to amend the law in order to provide for a 10-year statute of limitations for instituting deportation proceedings, subject to certain exceptions.

No. 2. *Advance Notice of Deportation and Stay of Deportation During Court Review*

For years the practice of the Immigration and Naturalization Service has been to give an alien ten days notice of deportation, so that he might wind up his affairs and bid his friends and relatives adieu. With the advent of the Attorney General's list in 1952 and the policy of secretly marking files "top priority," this practice has been disregarded in many cases.

In top priority cases, and such other cases as are selected, the practice has been to bundle the alien off post haste by plane to his

destination. The pendency of judicial review of the deportation order will not be respected by the Immigration and Naturalization Service unless there is a judicial stay or unless the Service determines that, in its opinion, the issue is one which should be litigated. Advance notice of deportation will not be given. When Michael Spinella, Joseph Accardi, Heikkila and others were seized, they were denied an opportunity to consult counsel, and were kept incommunicado until they were flown out of the country. This practice has been called "repulsive and abhorrent" by District Judge Edward P. Murphy and "uncivilized" by Senator Hennings.

The Immigration and Naturalization Service defends itself by complaining each year in its Annual Reports, and elsewhere, of dilatory tactics on the part of those who resort to repeated court actions. Press reports, however, state that the Service will not repeat its Heikkila performance and there is some indication that regulations or operations instructions will cover this matter. Less than 3% of last year's deportees came into court. Statistics will also show that there are not more than one or two cases a year where there has been resort to unjustified repetitious litigation. Heikkila has spent most of his time litigating whether declaratory judgment or habeas corpus was the appropriate remedy.

The Immigration and Naturalization Service's defenders feel that it must take aggressive action to deport and that occasional errors of judgment or other irregularities should not be held against it. The contrary view is shared by many who feel that "the history of liberty has largely been the history of observance of procedural safeguards" *McNabb v. United States,* 318 U.S. 332, 347 (1943). To prevent a recurrence of the Heikkila case and to prevent mooting of cases by deportations during the pendency of court review, it is proposed to require by statute 14 days advance notice of deportation and to forbid deportation during the pendency of court review unless a stay has been denied judicially. It should be noted in this connection that the Attorney General has submitted to Congress with his views for enactment a draft of legislation which would grant automatic stays to aliens who seek judicial review, unless otherwise ordered by the court.

Resolution

The Committee on Immigration and Nationality adopted, and submits for approval, the above resolution to amend the law in

order to provide for advance notice of deportation and a stay of deportation during court review.

No. 3. *Jurisdiction of the Board of Immigration Appeals*

Introduction

The Board of Immigration Appeals is the judicial arm of the Attorney General in immigration and nationality matters. In most cases the Board is the court of last resort for the Government and the alien in deportation and exclusion matters and for transportation, air and seaborne carriers, in the field of immigration fines.

The Board's jurisdiction is solely appellate (8 CFR 3.1(b)). As the Board has been successively a creation of the Secretary of Labor and the Attorney General, its jurisdiction has not been constant and frequent changes have been made in its jurisdiction.

The constant changes in the Board's jurisdiction, together with the lack of uniformity in allocating appeals to the one organization in the Department of Justice which is solely concerned with adjudication, is a cause for concern. The resolution herewith submitted attempts to settle the Board's jurisdiction once and for all and so vest it with appeals in all adjudicatory matters.

Previous Organization

In 1922 the Secretary of Labor created a Board of Review to consider and recommend disposition of all immigration cases. The Board was vested with administrative, as well as judicial functions, but with no power to make final decisions.

As early as 1931, the National [Wickersham] Commission on Law Observance and Enforcement advocated the creation of an independent tribunal so that the prosecution and administrative functions would be completely separated from judicial duties (Report on The Enforcement of the Deportation Laws (1931), 160-162). The Secretary of Labor's Commission on Administrative Procedure thereafter recommended the freeing of the Board from other than quasi-judicial duties.

On June 22, 1940, the Service was transferred to the Department of Justice; the Board of Immigration Appeals was established on August 30, 1940, as part of the Attorney General's Office. It differed basically from the Board of Review in its responsibility and authority for making final decisions subject to certification in a limited number of cases to the Attorney General.

Analysis of the Board's Present Jurisdiction

In the years that followed the transfer of immigration matters to the Department of Justice, the Board has been vested with greater judicial authority and has been made completely independent of the Immigration and Naturalization Service.

Its appellate jurisdiction has undergone several changes. Initially, all final orders of deportation were the Board's responsibility. Hearing officers merely made recommendations for deportation which were forwarded to the Board for final action. This has been changed by the grant of authority to hearing officers to enter final orders or deportation subject to appeal.

Originally, orders directing aliens to leave the United States voluntarily were subject to final action by the Board of Immigration Appeals. This has been changed by the grant of final authority to hearing officers to enter final orders directing departure in all cases where the alien has been in the United States for less than 5 years. No appeals are permitted to the Board in these cases.

For years the Board of Immigration Appeals had the sole authority to grant aliens adjustment of status. This was done through procedures known as pre-examination and suspension of deportation. Today, with the abolition of pre-examination and the enactment of 8 U.S.C. 1255 and 1259, adjustment of status has become largely a function of the Immigration and Naturalization Service and the Board has been shorn of this jurisdiction. The result is that many District Directors throughout the United States now pass upon these issues without any direct appeal to the Board.

Cases under these provisions of the law are distinctly in the field of adjudication, and appeals should lie to the Board of Immigration Appeals which is the one tribunal in the Department of Justice completely divorced from investigation and prosecution functions. In addition, no logical reason exists why the Board should have some appellate functions in cases involving status and not in others. The Board's case-load is such that it can now expeditiously deal with these cases. It will bring confidence to the public because of its independence and fairness because of its established impartiality. It will also bring uniformity to the administration and interpretation of our immigration and nationality laws which are now subject to divergent rulings by district directors and regional commissioners in various parts of the United States.

The immigration process involves one of the most important and sacred of human rights—the right and privilege of individuals to remain and enjoy life in the United States. It is, therefore, important that those who feel aggrieved by decisions of district directors and others who engage in functions of investigation and prosecution be accorded a right to appeal to the Board of Immigration Appeals which is solely concerned with adjudicatory matters and the exercise of the Attorney General's descretion.

The resolution submitted would have the effect of authorizing appeals to the Board of Immigration Appeal from all decisions of district directors, regional commissioners and special inquiry officers in the following instances:

1. Decisions of district directors on applications for adjustment under 8 U.S.C. 1255.
2. Decisions of district directors rescinding adjustment of status under 8 U.S.C. 1256.
3. Decisions of district directors on applications to change status under 8 U.S.C. 1258.
4. Decisions of district directors on applications for the creation of a record of admission under 8 U.S.C. 1259.
5. Decisions of district directors on all applications for preference status under the Immigration and Nationality Laws and any decisions rescinding such status.
6. Decisions of district directors on applications for consent to reapply for admission under 8 U.S.C. 1182(a).
7. Decisions of district directors on applications for reentry permits.
8. Decisions of district directors granting, refusing, or rescinding waivers of inadmissibility in deportation, exclusion, or visa cases.
9. Decisions granting, denying, or revoking stays of deportation upon claims of physical persecution or for any other ground.
10. The grant or denial of voluntary departure, irrespective of the length of time an alien has been in the United States.

II. *Committee's Activities in Administrative Realm*

Five areas of administrative activity were outlined in the Committee's report for the previous year, 10 *Ad. Law Bull.* 151, at 158, and progress has been made in terms either of continuing negotiations or official approval and acceptance of the Committee's suggestion.

A sixth area of administrative action undertaken by the Com-

mittee during the current year is the proposal that a copy of the decision and opinion of the Board of Immigration Appeals should be made available to counsel immediately upon referral of any such decision to the Attorney General for final decision, and opportunity afforded to counsel of record to file a brief and to respond to any motion made by the Immigration and Naturalization Service. Under present practice, no such copy or opportunity, or even notice of the referral, is available to counsel or the alien affected.

III. *Legislative Developments*

Immigration legislation has, over the years, normally been enacted in the closing days of Congressional sessions. Consequently, it is impossible to make any definite statement at the time this report was submitted. However, the Subcommittee on Immigration of the Senate Judiciary Committee has already started hearings on general immigration legislation, without reference to any specific bills, and on June 30, your Committee's Chairman, in testimony before the Senate Subcommittee, presented seven resolutions emanating from the Section which have been adopted as official ABA policy. These included the proposals for consolidation of the present overlapping responsibilities of the Visa Office of the Department of State and the Immigration and Naturalization Service of the Department of Justice; for establishment of a Board of Visa Appeals; for statutory status for the Board of Immigration Appeals; for exclusion only on record evidence; for broad application of the APA; for judicial review of deportation and exclusion orders; and for judicial determination of citizenship claims.

During the preceding Congress, your Committee's Chairman, with the approval of the Section Chairman and the Association President, testified in opposition to H.R. 13,311 (Walter), which would restrict judicial review of orders of deportation and exclusion in a variety of manners, and in particular would eliminate judicial review at the level of the District Court and require all such proceedings to be initiated in the Court of Appeals. The House of Representatives passed that bill last year, but the Senate took no action. The current version of the bill, H.R. 2807, has been favorably reported by the House Committee on the Judiciary, but three members of that Committee (Chairman Celler, Mr. Libonati and Mr. Lindsay) filed dissenting opinions. In this con-

nection, it is well to note that the views of the Judicial Conference were not sought by the Committee. It is noteworthy that although the Administration in 1958 urged enactment of H.R. 13,311, and the elimination of District Court jurisdiction, the Attorney General reversed himself recently and—at least in this respect—adopted the view of the American Bar Association by recommending that jurisdiction for judicial review of deportation and exclusion orders be retained in the District Courts. It is too early, at this writing, to predict whether your Committee's testimony will be accepted in other respects as well, but it is gratifying to be able to report this progress in respect of the jurisdiction of the District Courts.

Other legislation of a substantive character is before the Congress, but your Committee has not given consideration to such matters this year.

HARRY N. ROSENFIELD, *Chairman*

REPORT OF THE COMMITTEE ON THE IMPROVEMENT OF ADMINISTRATIVE PROCEDURE

The Committee on the Improvement of Administrative Procedure recommends the adoption of the following resolution:

Resolved, That the Section of Administrative Law recommends that the House of Delegates adopt the following resolution:

Preamble:

1. The President's first Conference on Administrative Procedure, called by the President of the United States in 1953 at the instance of the Chief Justice of the United States in his capacity as Chairman of the Judicial Conference of the United States, recommended a number of modifications in administrative agency procedures to eliminate unnecessary delay, reduce expenses and the volume of records and otherwise to improve administrative procedures, including the adoption of certain uniform rules of practice and procedure. Although some agencies have adopted some of these recommendations, there has been no systematic attempt to ascertain and evaluate the reasons why other agencies have found such recommendations unsuited to their operations or have failed to consider them.

2. The recommendations and the experience of the President's first conference demonstrated the effectiveness of such a conference as a method of arriving at sound recommendations for improving administrative procedures through the cooperative efforts of the agencies and departments and the Bar.

3. The effectiveness of the Judicial Conference in furtherance of the administration of justice in the courts gives reason to believe that a somewhat comparable body in the realm of administrative law would assist a sound growth and improvement of the Federal Administrative process; and

4. It is the consensus of the Federal Bar Association, the Judicial Conference of the District of Columbia Circuit, and the American Bar Association that, although many of the Federal agencies and departments with substantial adjudicatory and rule making functions have for some time been making earnest efforts to improve the administrative process by which the public interest and the rights, duties and privileges of persons are determined, there is continuing need for examination of their procedures and practices in order that improvements may be adopted when feasible

and that the President's Conference on Administrative Procedure should be established as a permanent organization to sustain interest in improving the administrative process through the full and frank analysis of problems and proposed solutions of the procedures of the various agencies and those affected thereby.

Resolution: Be It, Therefore, Resolved: That the American Bar Association sponsor and support the prompt establishment of a Permanent Conference on Administrative Procedure, composed of representatives of Federal Departments and agencies and members of the Bar, for the purpose of conducting continuing and practical studies of means for expediting agency proceedings and generally improving statutory and administrative procedures, and to this end suggest that:

(a) the President call an Interim Conference on Administrative Procedure to evaluate (i) the effect of the recommendations of the First Conference on Administrative Procedure and to consider (ii) the agency responses to the questionnaire on Agency Organization, Procedure and Practice, House Committee on Government Operations, 84th Cong., 2nd Sess. and other related matters;

(b) the President recommend, and the Congress enact, legislation authorizing the establishment of a Permanent Conference on Administrative Procedure; and

(c) the organization and functions of the Interim and Permanent Conferences be broadly authorized by Executive and Legislative action providing for membership, meetings, staff assistance, and the submission of reports and advisory recommendations to the President, Congress, Executive Departments, and other Federal agencies.

Be It Further Resolved, That the Section of Administrative Law be authorized to take such action as is appropriate to implement this resolution.

Reasons for the Resolution

The President's first Conference on Administrative Procedure resulted in carefully considered recommendations, most of which have not been acted upon by the various agencies. No attempt has been made to coordinate the various agency responses to identical questions propounded by the House Committee on government operations, 84th Cong., 2nd Sess., in its questionnaire on Agency Organization, Procedure and Practices nor to investigate the effect of such self-examination concerning observance of

the Administrative Procedure Act of 1946 upon prevailing agency practices.

In March, 1959, Judge E. Barrett Prettyman, addressing a meeting of the D.C. Chapter of the Federal Bar Association, urged that Association to attempt to secure the establishment of such a conference on a continuing basis as a means for improving administrative procedures through the interchange of agency experience and suggestions from private practitioners. On May 20, 1959, the National Council of the Federal Bar Association adopted a resolution proposing "to the Attorney General of the United States that he invite a committee of agency heads to consider and draft plans for the establishment of a permanent Conference on Administrative Procedure and make appropriate recommendations to the President thereon." On May 21, 1959, the Judicial Conference of the District of Columbia Circuit adopted a resolution recommending to the Judicial Conference of the United States that it encourage and support the prompt establishment of a permanent Conference on Administrative Procedure, composed of representatives of Federal Departments and agencies and members of the Bar." The American Bar Association approved and sponsored the President's first Conference on Administrative Procedure and is concerned with the improvement of the administrative processes whether by legislation or by independent action of the agencies. It is, therefore, clearly called upon to participate in the present drive to sponsor continual self-criticism and self-improvement by administrative agencies.

It is the belief of the committee that enabling legislation is required to give the contemplated permanent Conference on Administrative Procedure the status necessary to make it an effective means to the salutary ends proposed.

Respectfully submitted on behalf of the Committee

THEODORE H. HAAS, *Chairman*
RUTH SMALLEY, *Vice-Chairman*
A. NORMAN SOMERS, *Vice-Chairman*

APPENDIX

Judicial Conference of the District of Columbia Circuit

Resolution with Respect to Establishment of a Permanent Conference on Administrative Procedure, Adopted May 21, 1959

Whereas, It is the consensus of this Judicial Conference that, although many of the Federal agencies and departments with substantial adjudicatory or rulemaking functions have for some time been making earnest efforts to improve the administrative process by which the public interest and the rights, duties and privileges of persons are determined, nevertheless, there are many areas in which the administrative process can and should be further improved; and

Whereas, It is the consensus of this Judicial Conference that, many of the problems involved in eliminating undue delay, expense and volume of hearing records, in developing uniform rules of practice and procedure, in achieving greater efficiency and economy in the administrative process, and in generally improving the administration of justice, can best be solved by the cooperative efforts of the agencies and departments, and the Bar, directed toward continuous studies of the adequacy and efficiency of existing statutory and administrative procedures; exchange of information, experience and suggestions; and

Whereas, The effectiveness of the Judicial Conference in furtherance of the administration of justice in the courts affords precedent for believing that a somewhat comparable body in the realm of administrative law would assist a sound growth and improvement of the Federal administrative process; and

Whereas, The Conference on Administrative Procedure, called by the President of the United States on April 29, 1953, at the suggestion of The Judicial Conference of the United States, demonstrated the effectiveness of such a conference as a method of arriving at sound recommendations for improving administrative procedures; and

Whereas, The importance to the agencies and departments and to the public of solving procedural problems which were not resolved or dealt with by that Conference, as well as the sustained interest in improving the administrative process which such a conference stimulates, point to the desirability of a permanent Conference on Administrative Procedure, it is hereby

Resolved, That this Judicial Conference recommends to the Judicial Conference of the United States that it encourage and support the prompt establishment of a Permanent Conference on

Administrative Procedure, composed of representatives of Federal departments and agencies and members of the Bar, for the purpose of conducting continuing and practical studies of means for expediting agency proceedings and generally improving statutory and administrative procedures, and to this end that the Judicial Conference of the United States suggest that: (a) the President call an Interim Conference on Administrative Procedure; (b) the President recommend and the Congress enact legislation authorizing the establishment of a Permanent Conference on Administrative Procedure; and (c) the organization and functions of the Interim and Permanent Conferences be broadly authorized by Executive and Legislative action providing for membership, meetings, staff assistance, and the submission of reports and advisory recommendations to the President, Congress, Executive departments, and other Federal agencies.

REPORT OF THE COMMITTEE ON INDIAN MATTERS

The activity of the Committee on Indian Matters has served to focus attention upon areas where improvement can be made in aspects of Indian affairs concerned with administrative law. Exchanges of ideas among members of the committee have led to affirmative individual action in certain instances and to committee action in others. The actual improvements in the administrative process accomplished through activities of the committee and its members are gratifying. However, even more significant is the fact that the committee has identified additional areas where improvements are badly needed and has organized itself to work toward the proper solution.

1. *Revision of 25 U.S.C. § 81, dealing with the execution of contracts with Indian tribes.* We are pleased to report that the 85th Congress enacted Public Law 85-770 eliminating the requirement of executing contracts with Indian tribes before a Judge of a Court of Record, as favored by the committee. Practical experience of little less than a year under the new amendment discloses that it was a substantial step forward. Officials of many Indian tribes have expressed their appreciation for the amendment which now dispenses with the requirement that they travel many miles to appear before a Judge of a Court of Record in order to execute a contract. No adverse criticism has been brought to the attention of the committee.

2. *Efforts to review the Department of the Interior's revision of the Handbook of Federal Indian Law prior to its publication.* The Solicitor of the Department of the Interior in 1958 revised and brought up to date the Handbook of Federal Indian Law, originally prepared under the direction of the late Felix S. Cohen, former Associate Solicitor of the Department. Since the Handbook was revised pursuant to direction of Congress and the Handbook is the only recognized publication which purports to be a treatise on Indian law, the committee felt that the publication of the revision should not be done without public comment on the proposed changes. The committee membership offered to review the draft of the revision and make comments prior to its publication. However, the Department of the Interior refused to make the draft available for such purpose and the Handbook has been

published by the Government Printing Office. It is primarily an up dating of the Cohen Handbook with certain reflections of certain legislative and administrative policies of recent years favoring termination of Federal supervision over certain Indian tribes. The revised Handbook will no doubt be a very useful document.

3. *A program to complete and bring up to date Kappler's Indian Affairs, Laws and Treaties.* At the present time there is no complete and up-to-date compilation of Federal statutes relating to Indian affairs. The basic compilation of legislation in this complex field is Kappler, Indian Affairs—Laws and Treaties, the first two volumes of which were published in 1904 by the Government Printing Office under the direction of the then Senate Committee on Indian Affairs. Three supplemental volumes subsequently were prepared by Mr. Kappler under the direction of the Committee and were published in 1913, 1929, and 1941, respectively, by the Government Printing Office. Although the last of these volumes covers only treaties and acts of Congress affecting Indians down to June 29, 1938, to our knowledge no work has been done to bring the text up to date and to publish it. In addition, experience has shown that a number of items were omitted from the compilation for the period covered by Mr. Kappler.

The great need for an up-to-date and complete compilation has been apparent to members of the committee and lawyers concerned with the field. Accordingly, the committee has volunteered to Congress to do the lawyer work necessary to prepare a supplement to the basic five volume compilation and to include omitted material. Efforts are being made to persuade Congress to authorize an official publication and to make available the funds for cost of stenographic services, reproduction costs and a professional indexer. The committee is continuing its efforts to arrange such a project and is endeavoring to interest the Department of Justice and the Department of the Interior in supporting it.

At the annual meeting of the section the committee proposes to present a resolution favoring the project and to recommend that such a resolution be approved by the Board of Governors and the House of Delegates.

4. *Practice of the Department of the Interior with respect to service of process or its equivalent on an individual Indian or Indian tribe in protest, contest, and appeals arising out of decisions of the Bureau of Indian Affairs.* Frequently non-Indians seek relief from regulations or are aggrieved by the decisions of the Department arising out of transaction relating to Indian property or funds. The property at stake may belong to the Indian or to an Indian tribe. For example, where a bidder on a tribal oil and gas

lease seeks a refund of his deposit after the bid is accepted, the money involved belongs either to the tribe or the bidder. The practice of the Department of the Interior has been to decide the matter on the representation of the aggrieved party, without notice to the Indian or to the tribes concerned. This general situation has received study by the committee which recommends not only that provisions be made in regulations for the service of notice but that the procedure for appeal be clearly outlined in regulations and that any applicable regulations be simple and non-technical so that the individual Indians and Indian tribes without services of full-time counsel may understand them. The committee is continuing its efforts to urge the Department of the Interior to adopt such regulations. Anticipated regulations in this field have not been forthcoming. One of the principal problems is to insure that the regulations are not so technical and complex that they could not be used by the Indians involved.

5. *Supervision over approval of attorneys' contracts with Indian tribes.* At the present time, the Bureau of Indian Affairs within the Department of the Interior supervises approval of attorneys' contracts with Indian tribes. All contracts between Indian tribes and attorneys must be approved by the Commissioner of Indian Affairs or his authorized representatives. This authority has been delegated to the Bureau by the Secretary of the Interior. It has been frequently suggested that this responsibility could better be performed under the supervision of the Solicitor of the Department of the Interior, inasmuch as it involves relationship with attorneys and matters dealing with performance of duties by attorneys for their clients. Recently by request the membership of the committee was circularized for recommendations in this connection and the consensus reported is that jurisdiction over such contracts should be transferred to the Solicitor. We are advised that such a transfer is now being favorably considered within the Department.

6. *Comments by individual members of the committee on proposed rule making by the Department of the Interior.* Pursuing the policy of the committee that there should be adequate provision for notice to individual Indians or Indian tribes affected in proceedings before the Department of the Interior, a number of the individual members of the committee have filed comments on proposed rules and regulations published in the past year by the Department of the Interior. For example, the Federal Register of November 27, 1958, gave notice of intention to revise Part 141, General Forest Regulations, Title 25 of the Code of Federal Regulations. The Federal Register of January 21, 1959, gave notice of intention to revise Part 121, issuance of patents in fee,

certificates of competency and sale of certain Indian lands, Title 25 of the Code of Federal Regulations. Several of the individual members of the committee, who filed comments on this proposed rule making, sent copies to other members of the committee who also filed comments. Not only did this practice result in effectively presenting observations made by individual members of the committee in the course of the committee work but resulted in a more complete presentation of the diverse views of the members of the committee, for consideration by the Department in making its final rules. The final rules have not yet been published, however, we are hopeful that they will contain adequate provision for notice.

7. *The application of the Administrative Procedure Act to proceedings in the Bureau of Indian Affairs.* The committee has made a preliminary inquiry into the question of the application of the Administrative Procedure Act in proceedings in the Bureau of Indian Affairs and the related problem of the positions of Indian Probate Examiners as related to administrative practice. The preliminary check has disclosed the need for careful study of this area. Arrangements have been made to press this study forward and to make a full factual report and obtain the views of the Department of the Interior, interested persons, Hearing Examiners and Indian Probate Examiners. This should be a primary area for emphasis in the next year.

8. *Improving procedure and facilitating disposition of pending Indian claims.* Some of the most complex and difficult litigation occurs in tribal Indian claims against the United States. These proceedings are generally before the Indian Claims Commission, where the cause of action occurred prior to August 11, 1946, or before the Court of Claims. The principal area in which improvement has been made in the administrative trial of cases before the Indian Claims Commission is in the adoption by the Commission of a rule acquiring submission to the other party at least thirty days prior to the commencement of the trial of documents upon which the parties will rely at the trial. This practice has saved a substantial amount of time at the trial, since many of the documents are very long and complex. In the next year it is suggested that the committee study more fully procedures for facilitation of Indian claims. One area which might be used more profitably than at present is pretrial conference and stipulation of facts, limiting the issues for trial.

9. *Cooperation with new Federal Bar Association Indian Law Committee.* The Federal Bar Association recently has established a new Committee on Indian Law. Members of our committee have assisted in the organization of the new committee and have

made recommendations as to matters to be studied by it. We feel this will result in an effective coordination with the F.B.A. group which is composed mostly of government lawyers.

The committee membership this year has consisted of Charles F. Luce, Vice-Chairman, Charles J. Alexander, Cedor B. Aronow, Ralph A. Barney, Virginia A. Davies, Laurence Davis, John C. Farrar, H. E. Hyden, Arthur Lazarus, Jr., George E. Lyman, Larry E. Mills, Marvin J. Sonosky, Harold Vogel, Joel D. Wolfsohn, Charles H. Woods, and James O. Worrell. Because of the untimely death of Mr. Wilbur B. Davis in January, the committee was deprived of his services as one of the Vice-Chairmen. Appreciation for the cooperation and contribution of the members is noted with pleasure by the Chairman.

Robert W. Barker, *Chairman*

REPORT OF THE COMMITTEE ON THE INTERSTATE COMMERCE ACT

Committee Views on Code of Standards of Conduct in Administrative Proceedings

(a) *Adjudicatory Proceedings.* The draft of the suggested Code of Standards of Conduct in Administrative Proceedings insofar as it would apply to adjudicatory proceedings was the subject of varying views on the part of the Committee on the Interstate Commerce Act. The greater number of those submitting their comments were opposed to this suggested legislation as a matter of principle. It was their view that the canons of ethics of the legal profession as well as those promulgated by agencies such as the Interstate Commerce Commission were an adequate safeguard against abuse, particularly in view of other remedies in law presently available to cope with particular instances of abuse. One member supported the draft as submitted without reservation. Others presented suggestions for clarification of language, aimed both at avoiding ambiguity in the proposed bill, and at preventing undue rigidity particularly in the non-substantive (i.e. procedural) phases of the administrative process. Comments of all were submitted to the Chairman of the Section's Committee on Agency-Tribunal Standards of Conduct, Hon. David W. Peck.

(b) *Rule Making Proceedings.* With respect to the proposal to extend the Code of Standards of Conduct to Rule Making Proceedings, again several members of this Committee questioned the soundness of the proposed legislation as a matter of principle. The view was expressed that the instances of abuse do not warrant the enactment of a criminal statute which would cast a cloud over all administrative practice. One member favored the bill as submitted for consideration. Others were of the view that if such a code were enacted with respect to Adjudicatory Proceedings it should also apply to Rule Making Proceedings. Several members of the Committee offered suggestions as to draftsmanship in order more effectively to achieve the avowed objectives of the proposed bill.

Serious misgivings were expressed by some Committee members that the revised draft, extended to rule making, may be so

interpreted as to preclude agencies from utilizing their own staff studies or from applying the doctrine of official notice as in the past. These communications from individual Committee members have likewise been transmitted to Judge Peck.

The Proposal for the Creation of a Department of Transportation and Communications

The Committee on the Interstate Commerce Act gave consideration to the proposal to transfer all the federal regulatory agencies having jurisdiction over transportation and communications to a single federal Department of Transportation and Communications. As the basis for analysis and comment H. R. 985, introduced in the present Congress, was studied.

Nine members of the Committee expressed themselves as strongly opposed to the proposed legislation in principle, as unwarranted and unsound in concept. One member supported the proposal. One member favored the principle of a single federal agency charged with the responsibility of administering the Acts of Congress pertaining to the economic regulation of domestic transportation—but was not prepared to comment as to whether this should be at the cabinet level. The basic opposition generally was directed against transferring the quasi-legislative and quasi-judicial functions of regulatory agencies such as the Interstate Commerce Commission to a federal executive department. Support was indicated by some Committee members for a single regulatory agency having jurisdiction over all forms of Interstate transportation if it were constituted as an arm of the legislative branch and were independent of the executive branch of government. The view was also expressed that the Interstate Commerce Commission had functioned effectively as an independent regulatory agency and that its transfer to an executive department would not be in the public interest.

Analysis of Survey and Study of Administrative Organization, Procedure and Practice by the Committee on Government Operations, U. S. House of Representatives

In accordance with the written request of the Chairman of the Section of Administrative Law, an analysis and abstract of that portion relating to the Interstate Commerce Commission in the above survey was made and submitted to the Section Chairman.

John F. Donelan, *Chairman*

REPORT OF THE MOBILIZATION COMMITTEE

At its Mid-year meeting in February 1959, the Board of Governors and the House of Delegates of the American Bar Association adopted without dissenting vote the Resolution pertaining to mobilization submitted by John B. Gage, Esq., Chairman of the Administrative Law Section. This Resolution, calling for immediate consideration by the Executive Branch and Congress of administrative procedures and safeguards best suited to mobilization and other emergency legislation, had previously been proposed by the Mobilization Committee of the Section and had secured the approval of the Section at its annual meeting last August.

The Resolution of the American Bar Association further directed the Administrative Law Section to express this need to appropriate agencies of the Government and to work with them toward adoption of such procedures and safeguards. The Section Chairman referred further implementation of the Resolution to the Mobilization Committee.

Accordingly, members of the Mobilization Committee discussed the subject matter of the Resolution and possible methods of implementation with appropriate officials of the Office of Civil and Defense Administration, the principal agency of the Government concerned. OCDM indicated that it would cooperate in the work of the Committee and would welcome its assistance. OCDM suggested that the first specific project cover price and wage stabilization measures.

The Chairman of the Mobilization Committee has appointed a Subcommittee to commence work on this project and is arranging for necessary clearances and materials to be made available to the members.

FRANK X. BROWN, *Chairman*

REPORT OF THE NATIONAL COMMITTEE

This Report summarizes the status of legislation and Section resolutions to which the various Committees of the Section have given their attention this past year:

Administrative Procedure Act

S. 1070 was introduced on February 16, 1959, by Senator Ervin and Senator Butler as a recodification of the Administrative Procedure Act. This is the American Bar Association's Code of Administrative Procedure.

Aviation

Although a continuing attempt has been made to coordinate with the American Bar Association's Committee on Aviation, in connection with the Section's Resolution on overseas and territorial air transportation decisions (10 Ad. Law Bull. 7), no agreement has yet been reached with the Aviation Committee. A recommendation similar to that of the Section was made by the House Subcommittee on Legislative Oversight. H. Rept. 2711, 85th Cong.

Congressional Committees on Administrative Procedure

This area is covered by the American Bar Association's appropriate ad hoc Committee.

Food and Drug

This Committee is interested in H.R. 13254, which was passed by Congress and approved by the President and became Public Law 929, 86th Congress. This is the Food Additives amendment to the Federal Food Drug and Cosmetic Act.

Hearing Examiners

This area is covered by the American Bar Association's proposal S-600, as well as by the Section's Committee.

Immigration and Nationality

Although the Senate Judiciary Committee's general immigration legislation hearings were adjourned indefinitely after a single day's record, additional hearings are envisioned. As this Report is being written, similar hearings on the House side are expected shortly. A statement on behalf of the American Bar Association has been prepared for presentation before both Committees by the Section dealing with seven resolutions:

Single agency administration of immigration and nationality laws; establishment of a Board of Visa Appeals; a statutory Board of Immigration Appeals; exclusion only on record evidence, rather than without hearing on the basis of confidential information; application of the Administrative Procedure Act to the immigration and nationality area; jurisdiction to review of deportation and exclusion orders under Section 10 of the Administrative Procedures Act; jurisdiction for determination by the Federal Court of good faith citizenship claims, with a certificate of identity being issued to those outside the United States to permit them to appear in person in such proceedings.

H.R. 2807, the Walter bill restricting judicial review of deportation and exclusion orders as well as eliminating judicial review at the District Court level, has been favorably reported by the House Judiciary Committee, with three strong dissents. (H. Rept. 423, June 2, 1959.) Since the American Bar Association's opposition to the predecessor bill (H.R. 13311, 85th Cong.) was registered, the Attorney General has adopted the American Bar Association's view that jurisdiction for judicial review of deportation and exclusion orders be retained in the District Courts. (See, 105 Cong. Rec. 8259ff, May 26, 1959.)

The Administration bill covering immigration has not yet been introduced, although it is expected shortly, with hearings to follow shortly thereafter in the House Judiciary Committee.

Indian Affairs

The Committee on Indian Affairs reports that the 85th Congress by the enactment of Public Law 85-770 amended 25 United States Code, Section 81, dealing with the execution of contracts with Indian tribes, eliminating the requirement that the contract be executed before a Judge of a Court of Record. This has been

of considerable practical benefit in that it eliminated the necessity of traveling to a point where such a Judge was available.

Judicial Review

As it relates to deportation and exclusion, see "Immigration and Nationality" heading.

Labor Relations Matters

In July, 1957, the Section and the American Bar Association's House of Delegates adopted the following resolution:

> *"Resolved,* That the American Bar Association supports the enactment of legislation for the taking of appropriate administrative action which will provide a remedy for the administrative inaction of the National Labor Relations Board in the 'no man's land' area." 11 Ad. Law Bull. 32.

During the recent debates on S. 1555 (the Kennedy-Ervin labor bill), certain amendments were offered pertinent to the American Bar Association's resolution. Senator Cooper of Kentucky proposed an amendment to the National Labor Relations Act, leaving any State or Territorial agency free to "exercise jurisdiction over all cases over which the (National Labor Relations) Board has jurisdiction, but by rule or otherwise, has declined to assert jurisdiction" (105 Cong. Rec. 5942, April 24, 1959).

Senator Prouty of Vermont then unsuccessfully proposed a substitute proposal, whereby jurisdiction over the "no man's land" area would be placed in the hands of the courts rather than the State or Territorial agencies, unless legislatures turned this task over to such agencies (105 Cong. Rec. 5949, April 24, 1959).

The Senate adopted the Cooper Amendment by vote of 78 to 15 (105 Cong. Rec. 5951, April 24, 1959). Thereafter, the Senate passed the labor bill as amended by vote of 90 to 1 (105 Cong. Rec. 6048, April 25, 1959).

As this Report is written, the House Labor Committee is drafting its bill. Because of the atmosphere of strife connected with this legislation, its provisions are still uncertain. However, the "no man's land" proposal is not considered to be among the most controversial areas involved.

Money Penalties Imposed by Federal Agencies

In 1955, the Section adopted a resolution calling for adequate and fair procedures in administrative proceedings involving the imposition of money penalties (8 Administrative Law Bull. 9). This resolution was implemented by the House of Delegates in 1956, when the Section was authorized to ensure fair procedural safeguards in actions involving the imposition of money penalties for alleged violations of law or regulations (81 American Bar Association Reports 384, 385).

To date there have been a number of bills introduced in the 86th Congress relating to this area, although no action has been taken on any of them.

S. 504, introduced by Senator Dirksen, would amend Section 239 of the Immigration and Nationality Act. H.R. 4180, introduced by Congressman Bosch, would amend Section 901(a) of the Federal Aviation Act making civil penalties apply to violations of civil air safety regulations. S. 1542, introduced by Senator Magnuson, also amends the Federal Aviation Act with regard to imposition of civil penalties under Section 901.

S. 1737, introduced by Senator Magnuson, and H.R. 6574, introduced by Congressman Harris, relate to forfeitures arising from violations under the Communications Act or regulations. H.R. 7599, introduced by Congressman Williams, and H.R. 7600, introduced by Congressman Springer, would amend Section 901(a), the civil penalties provision of the Federal Aviation Act.

At the appropriate time, the Congressional Committees involved will be made aware of the American Bar Association's views.

Public Contracts

The Public Contracts Committee conferred with representatives of the staff of the Joint Committee on Internal Revenue taxation with reference to extension of the Renegotiation Act, with a view to seeking recognition of the adversary character of proceedings before the Renegotiation Board and providing for a greater degree of procedural due process for contractors who are parties to the proceedings. This legislation is still before the Congress.

Representation Before Agencies

Congressman Walter introduced H.R. 2239, whereby members of the Bar of the highest Court of a State, or the District of

Columbia would be eligible for admission to practice before administrative agencies. No action has developed on this bill.

The Walter Bill is not unrelated with the American Bar Association's proposal, which is being urged by uniform agency rule via the Office of Administrative Procedure.

Securities

This Committee has presented to the Committee on Interstate and Foreign Commerce of the House of Representatives a statement on behalf of the American Bar Association and will testify at public hearing in committee. The Committee is concerned with legislation dealing with the right to withdraw an application which has been filed with the Commission as well as legislation dealing with the power of the Securities and Exchange Commission to postpone, without prior notice or hearing, the effective date of the registration statement filed under the Securities Act of 1933. As of the time of the preparation of this Report the anticipated hearings have not occurred. Amendments of the Securities Act of 1933 on the two subjects mentioned have been drafted by this Committee and submitted to the Congress for consideration.

Standards of Agency Conduct

On April 29th, Chairman Harris of the House Interstate and Foreign Commerce Committee introduced H.R. 6774, to implement the American Bar Association's recommendations for the establishment of standards of conduct for agency hearing proceedings of record. This bill seeks to minimize *ex parte* influence in Agency adjudications and would be applicable to Agency personnel engaged in the decisional process. Cf., S. J. Res. 30, introduced by Senators Javits and Keating, establishing a Commission on Federal Government ethics. See also, H.R. 4800, introduced on February 18, 1959 by Congressman Harris.

BERNARD J. GALLAGHER, *Chairman*

SEPARATE REPORT OF VICE-CHAIRMAN

On the basis of three-years' active effort with the Section's National Committee, the Vice-Chairman feels that the work of this Committee, as well as that of other Committees and the Section as a whole, would be advanced by the prompt compilation of a full annotated list of Section resolutions, whether or not approved or

implemented by the House of Delegates or the Board of Governors of the Association.

Such a compilation should include the full text of resolutions, together with subsequent amendments or implementation and appropriate references to the Administrative Law *Bulletin* or the American Bar Association *Reports*.

This list must necessarily be compiled under the direction of the Secretary, who has access to the historical records of the Section.

CHARLOTTE P. MURPHY, *Vice-Chairman*

REPORT OF THE COMMITTEE ON NATURAL RESOURCES AND INTERIOR AFFAIRS

Summary of Developments

This report concerns itself with matters arising in the Department of the Interior and particularly with matters over which the Bureau of Land Management of that Department has initial jurisdiction. We treat with (1) several court decisions in which the Departmental regulations and the APA figure; (2) various Departmental decisions involving the APA or interpretations of the rules of practice of the Department; and (3) examples of voluntary adherence within the Department to the spirit of the proposed rule making provisions of the APA. No recommendations are made requiring Section action. Attention is invited, however, to the wealth of Departmental decisions in which appeals have been dismissed because of some technical non-compliance with rules of practice. While it is recognized that the Department must operate within its rules, the suggestion is made that the Committee pursue the major areas of technical default with Departmental officials next year in an effort to determine whether some changes might result in fewer dispositions on purely technical grounds.

1. *Court Decisions*

Among court decisions of interest in this field handed down over the past year are the following:

a. *Eastern States Petroleum and Chemical Corp.* v. *Seaton,* 163 F. Supp. 797, 165 F. Supp. 363 (U.S. D.C., D.C. 1958)

Plaintiff sought a declaratory judgment and a final injunction to declare null, void and illegal the Voluntary Oil Import Program established in 1957, under which importations of crude into the U.S. are limited. By Executive Order 10761 (1958) persons who fail to comply may not sell their products to the U.S. The matter was first decided on a motion for a preliminary injunction in which the Executive Order was attacked as beyond the power of the President and a situation, in any event, to which the provisions of the Administrative Procedure Act should apply, both in the establishment and in the implementation of the program.

The motion was denied on the basis that the Buy American Act afforded legal ground for the Program and that the APA is not applicable in connection with a limitation and procurement program of this type.

The Court of Appeals for the District of Columbia reversed on the ground that the issue of arbitrariness in the implementation of the program which plaintiff pleaded provided a claim upon which relief could be granted. That Court directed a rehearing to afford the Government opportunity to controvert the allegations of arbitrariness.

On the rehearing the Court found that plaintiff had been accorded one administrative hearing and several other opportunities to air its case. On this and other considerations the Court found the allegations of arbitrariness not sufficiently supported to warrant the issuance of a preliminary injunction.

b. *McKenna* v. *Seaton* 3 L.ed.2d 71 (1958), 259 F. 2d 780 (D.C. Cir., 1958)

This case was noted in our report last year, at which time there was still opportunity for a petition for certiorari. A petition was filed but denied by the Supreme Court. Thus a prior applicant for an oil and gas lease, having corrected his application pursuant to an Interior ruling giving him time to cure violations in his filing of mandatory regulations of the Department, was entitled to a lease even though McKenna had filed a proper application before the ruling extending time to the first applicant was made.

c. *Adams* v. *Witmer and Berriman,* No. 15859, 9th Cir., Dec. 10, 1958

Adams applied for patents to certain mining claims within the Los Angeles National Forest which were contested by the U.S. Forest Service. The applications were rejected by the local Land Office (of which Witmer was Manager) which action was affirmed by the Director of the Bureau of Land Management and an order entered directing that Adams' mineral entries be cancelled. On appeal to the Secretary of the Interior, Adams moved that the decisions below be set aside on the ground of non-compliance with the applicable provisions of the APA, and that the proceedings be remanded for rehearing. The motion was heard and rejected. (65 I.D. 225 (1957))

When Berriman, as District Forest Service Ranger, demanded possession of the mining claims and ordered Adams to remove buildings from the premises, Adams went into Federal District Court in California seeking a declaration that the administrative decision and order were invalid and an injunction against the

two Federal employees named in the complaint. The complaint was dismissed for failure "to state a claim of which this court has jurisdiction against the defendants . . . , either in their official or personal capacity." In a comment appended to his order, the District Judge indicated this to be a suit against the United States, without its consent. He also considered that the APA did not apply, but if it did, the action should be directed against the Secretary, who was not within the jurisdiction, and not against the Secretary's subordinates, who had been named.

The appeal to the Ninth Circuit asserted the applicability of the APA and the violation of that Act in that the officer who took the evidence made no decision—this having been made by Witmer who heard none of the testimony; that Witmer, who was engaged in both investigative and prosecutive functions was in violation of Sec. 5(c); and that plaintiff was denied the opportunity provided in Sec. 8(b) to propose findings and conclusions with supporting reasons. In addition, Adams argued that inasmuch as the order was reviewable under the APA the trial court was required to provide the judicial review called for in Sec. 10.

In its decision rendered on Dec. 10, 1958, the Ninth Circuit considered the APA applicable both to the administrative procedure in the case and to the right of judicial review. The Circuit found Adams' right to his mining claims property right of which he could not be deprived without constitutional due process which meant a hearing (citing *Wong Yang Sung v. McGrath,* 339 U.S. 33 (1950) and *U.S. v. O'Leary,* 63 I.D. 341 (1956)); and that the history of the treatment of mining claims in the Congress and the courts indicated a disposition to give judicial review to claims of right to mining properties long before the APA came into being. This history was treated as consent by the United States to suit.

The Court disposed of the Government's contention that the Secretary was an indispensable party by ruling that whether the higher official was necessary as a party was to be "determined on practical considerations" (citing *Williams v. Fanning* 332 U.S. 490 (1947)—postal fraud order; *Hynes v. Grimes Packing Co.,* 337 U.S. 86 (1949)—Interior order closing a fishing ground; *Shaughnessy v. Pedreiro,* 349 U.S. 48 (1955) and *Ceballos v. Shaughnessy,* 352 U.S. 599 (1957)—both immigration cases.) The Court concluded that if the officials sued by Adams ceased their interference Adams would have all the relief he sought. Thus the Secretary was held not to be indispensable.

Although having agreed with Adams that the procedural requirements of the APA should apply, the Court went on to hold that a waiver was effected by the failure to make timely objection.

It was pointed out that Adams did not raise the procedural requirements of the APA until his appeal to the Secretary. His case had by then been through the local Land Office and the Director of the Bureau of Land Management. Reference was made to the provision in the Department's rules of practice (in effect at the time Adam's case was in process, but no longer in the rules) that at the time of appeal to the Director "All grounds of error not assigned or noticed and argued in the brief will be considered as waived." (43 C.F.R. 221.50)

The opinion continues that even though, because of the waiver, judicial review under Sec. 10 of the APA could not find that the Government failed to observe procedure required by law (Sec. 10(e)), there was still open to scrutiny whether the agency action was arbitrary, in excess of statutory authority, or unsupported by substantial evidence. All of these could be looked into by a court review of the whole record. The case was remanded for further consideration in accordance with the opinion.

In January 1959 the Government filed a "Petition . . . for Rehearing and Suggestion that such Hearing be had *en banc* and Motion to Dismiss the Appeal as Moot as to Paul B. Witmer." The Government's brief asserts the indispensability of the United States but is directed mainly to the indispensability of the Secretary, over whom only the Federal Courts in the District of Columbia have jurisdiction. The Government argues that if any relief can be granted by the courts it must be in a judgment directed to the Secretary by a court having jurisdiction over him, requiring him to take affirmative action, through his subordinates, to restore Adams' mineral entries on the books. If the opinion stands the Government says the "floodgates" for litigation challenging decisions by the Secretary . . . in district courts throughout the country" would be opened; ". . . diverse policies of the many federal . . . courts . . . will be substituted for the single secretarial policy"; and "courts . . . not expert in these management matters with which the administrators are dealing daily" will be called upon for rulings. On the questions of indispensability and the proper forum, even if the APA were applicable, the decision is claimed to be in direct conflict with holdings of the same Court in *Fahey v. O'Melveny & Myers,* 200 F. 2d 420, 452, 478-79 (9th Cir., 1952) involving dissolution orders by the Home Loan Bank Board directed against a Federal Home Loan Bank.

The Court directed that Adams file an answering brief. As of this writing no further action has been taken by the Court on the Government's petition.

2. *Departmental Decisions*

The Interior Department has two classifications for decisions of the Solicitor, one known as "published" decisions which are available in bound form from the Government Printing Office; the other known as "unpublished" which are available quarterly from the Solicitor's office in mimeographed form. The former may be identified by a citation such as 65 I.D. 336, while the latter carry only a serial number, such as A-27765. While an effort is presumably made to embalm the more important cases in the I.D.'s, thus making them more available to practitioners, it is important to realize that a tremendous body of Interior Department precedent resides in the unpublished decisions. It is not unusual to be confronted with a published decision which cites only unpublished decisions to support a ruling.

Some decisions in both categories during the past year of some consequence in the field of administrative law, are as follows:

a. *The Dredge Corporation,* 65 I.D. 336 (1958)

This decision affirms an earlier decision involving the same applicant and the same lands (64 I.D. 368 (1957)). Its chief interest is in the fact that it distinguishes *U.S. v. O'Leary,* 63 I.D. 341 (1956), the first case in which the Department stated affirmatively that a mining claim is a claim to property which may not be declared invalid without adherence to constitutional requirements of procedural due process, which meant a hearing, as provided for in the Administrative Procedure Act. The Department's rules of practice were changed to provide such hearings.

In the *Dredge* case the Department ruled that the mining claims were void *ab initio* because they were located on lands which had already been classified for disposition under the Small Tract Act, or lands which were held under oil and gas leases pursuant to the Mineral Leasing Act. Hearings under the APA, the decision reads "are aimed at and confined to hearings for the purpose of receiving evidence on factual issues" (p. 339). Portions of Sections 5, 7 and 8 of the APA are cited (including Sec. 5(a)(3) to the effect that persons entitled to notice of a hearing are to be timely advised of "the matters of fact *and law* asserted" (emphasis supplied), for the proposition that they "demonstrate beyond doubt that they envision hearings for the purpose of resolving factual disputes, not proceedings for hearing oral argument on questions of law with the basic facts not in dispute" (p. 340).

The decision continues: "It is only when there is a possibility

that a right may have been acquired in the land that the rule laid down in the *O'Leary* case is applicable" (p. 341). This follows an examination of cases in the Department back to 1900 in which mining claims have been declared invalid on the basis of facts of record, without hearing. The conclusion is reached that "for well over 50 years and probably much earlier, the Department has followed two distinct procedures in determining the validity of mining claims, holding hearings in cases turning on questions of fact and not holding hearings in cases turning on questions of law" (p. 336).

The rationale of *Dredge* makes it difficult to find the reason for the sweeping language of *O'Leary*. *O'Leary* was arrived at without benefit of citation of a single Departmental decision. It was determined instead on the principles of *Wong Yang Sung v. McGrath,* 339 U.S. 33 (1950), *Riss & Co. v. U.S.,* 341 U.S. 907 (1951), and similar cases. It is hoped that if it is not quite clear to the Department whether a question of law or fact is involved, a hearing will be ordered. In any event, without attempting to pass on the correctness of the result in the *Dredge* case, the statement in the decision that hearings under the APA "are aimed at and *confined* to hearings for the purpose of receiving evidence on factual issues" (emphasis supplied) is clearly too broad for general application.

b. *H. L. Stickney,* A-27765 (Aug. 26, 1958); *Lucille Ethel Cruz, et al,* A-27931 (May 21, 1959)

In last year's report we noted that the rules of practice had been amended to permit a grace period of 10 days for the receipt of documents necessary to perfect an appeal, as long as it was evident that the documents had been mailed within the 30 day period required.

The above captioned cases indicate that the rule is being strictly applied. In both, the documents were received well within the 10 day grace period but had been mailed one day after the 30 day period had expired.

The grace period was established because of some confusion as to the office in which documents must be lodged, on the theory that if the document was directed initially to the wrong office, it would reach the proper office in ten days. Also, it permitted parties a full thirty days in which to act as long as their filings were postmarked at some time on the last day. If appealing to the Director of BLM, the Appellant must file a *notice* of appeal and a $5.00 filing fee with the officer who made the decision (not the Director) within 30 days after receiving the decision involved. If the *notice* is not accompanied by a *statement of reasons* for the appeal, such a statement must be filed with the Director (not the officer who made the decision) within 30 days after the notice was filed. Then,

if one later appeals to the Secretary, a *notice* of appeal must be filed with the Director and a *statement of reasons* filed with the Secretary (30 days being the limitation again) unless the statement accompanies the *notice,* in which case a single filing with the Director is sufficient. If there are adverse parties involved, they must be served with both the *notice* and the *statement* within 15 days after each document is filed. Failure to file within any of these time limits subjects the appeal to summary dismissal (43 CFR Sec. 221.98). In fact, the Department has construed dismissal to be mandatory under its rules if the notice of appeal is not timely received in the appropriate office.

The harsh result in *Stickney* and *Cruz* (see also *Duncan Miller,* 65 I.D. 380 (1958), *Edwin Hastings,* A-27831) is of course justified under the rules as they stand. These and the large number of others disposed of on technical grounds, however, indicate that some re-examination of the rules on these details may be in order. Examples of cases in 1958, most of which were not decided on the merits because of technical disqualifications, are:

> *Christian Weiger,* 65, I.D. 402—failure to pay filing fee in time on appeal to Secretary; *Campbell and Campbell,* A-27648, *Muroc Land Co.,* A-27674, *Carson et al.,* A-27600, *Richardson,* A-27664, *U.S. v. Allen,* A-27676, *Robinson,* A-27778, *Frazier,* A-27886, *Great Western Oil Co.,* A-27873, *Wolff,* A-27776—failure to serve adverse party; *Cuccia and Conley,* A-27484, *Smith,* A-27708, *Spofford,* A-27738, *U.S. v. Pressentin,* A-27495, *Alaska Oil and Gas,* A-27792, *Hiles,* A-27739, *U.S. v. Matsen,* 65 I.D. 453,—untimely filing with the Director; *Hale,* A-27631, *Albrecht,* A-27656, *Wyoming Minerals Corp.,* A-27696, *Erickson,* A-27579, *Pollard,* A-27754, *Jensen and Sons,* A-27803, *Stickney,* A-27682, *Hale,* A-27736, *Ryczkowski,* A-27721, *Gates,* A-27698, *Bradshaw,* A-27762, *Whitmer and Casperson,* A-27820, *Cook and Miller,* A-27720, *U.S. v. Shireman,* A-27504, *Klein,* A-27771,—failure to file statement of reasons with the Secretary; *Rhoads,* A-27610, *Mandel and Rosenfeld,* A-27629—failure of timely filing with the Secretary; *Lelles,* A-27678, *Nelson,* A-27828—failure to file statement of reasons with the Director; *Jennings,* A-27589, *Miller and Whittier,* A-27623, *Miller,* A-27715-A, *Franco Western Oil Co.* 65 I.D. 316, *Young,* A-27753—failure to file a sufficient statement of reasons; *U.S. v. Johnson,* A-27699, *Figi,* A-27709, *Webster,* A-27780—timely filing in one office but untimely receipt in the Director's office.

It is suggested that in the next year the Committee re-examine the rules in cooperation with Departmental officials, to determine whether changes which might serve to cut the volume of technical

dismissals might not be attempted. It is recognized that the volume of cases with which Interior must contend requires rules of strict application but it seems unfortunate that the most marked result of the new rules adopted in 1956 is the disqualification for technical reasons of so many appeals.

3. *Proposed Rule Making*

The Interior Department has made a laudable effort, particularly in the past year, to conform to the spirit of the rule making provisions of the APA although being careful to disclaim that the Department is required to follow the Act.

Changes in regulations or the promulgation of new regulations in which there is a substantial public interest are published by the Department in the *Federal Register* as "proposed rule making." At the same time the Department's Information Office issues a release announcing the forthcoming publication and summarizing the subject matter. Examples of this are changes in the mineral leasing regulations, publicized last October; new rules and regulations, providing for a hearing where requested, in connection with determinations by the Columbia Basin irrigation project manager as to the eligibility of a farm unit to receive water (24 Fed. Reg. 3375, April 30, 1959); proposed rules on the erection and maintenance of advertising displays on the public lands (24 Fed. Reg. 4058, May 20, 1959); and rules on the disposal of Federal properties in Boulder City (24 Fed. Reg. 4252, May 27, 1959).

The disclaimer is typically stated by Interior as follows:

> "This proposed amendment relates to matters which are exempt from the rule making requirements of the Administrative Procedure Act (5 U.S.C. 1003); however, it is the policy of the Department of the Interior that, wherever practicable, the rule making requirements be observed voluntarily. Accordingly, interested persons may submit written comments, suggestions or objections with respect to the proposed amendments to the Bureau of Land Management within 30 days of the date of publication of this notice in the Federal Register."

Any suggestions received are given careful consideration and changes are made accordingly in the regulations as finally promulgated. See *e.g.* 24 Fed. Reg. 4140, May 22, 1959, for the amended rules and regulations applicable to mineral leasing, as ultimately adopted, following publication as proposed rule making last October.

ROBERT L. MCCARTY, *Chairman*

REPORT OF THE NOMINATING COMMITTEE

Your Nominating Committee nominates the following members of the Section for the offices indicated to be filled by election at the annual meeting:

For Chairman, Earl W. Kintner.
For Vice Chairman, Whitney R. Harris.
For Secretary, Elizabeth C. Smith.
For Council, Donald C. Beelar (3 years), Raoul Berger (3 years), Valentine B. Deale (3 years), Counts Johnson (1 year), Frank E. Cooper (3 years).

Statement of Applicable Provisions of By-Laws of the Section and Discussion

Article III, Section 3 of the By-Laws of the Section provide that the offices of Chairman, Vice Chairman and Secretary must be filled by Annual Election.

Article III, Section 5, provides that no person shall be eligible for nomination or election as an officer or a member of the Council unless he shall have been a member of the Section throughout the year in which the election is held, and no member of the Council who is serving as an elected member and has served as such continuously for a period of three years shall be eligible for re-election as a member of the Council.

All of the nominees herein recommended by the Nominating Committee have been members of the Section throughout the year in which the election is held, and hence all meet the requirements of Section 5, Article III of the By-Laws of the Section.

The terms of Robert M. Benjamin, Charles E. Long, Jr., and L. Clair Nelson expire this year and all have served as elected members continuously for a period of three years; accordingly, they are not eligible for re-election.

Valentine B. Deale was elected in February, 1959, by mail vote to fill the vacancy created by the resignation of Arnold Levy who had, in turn, been elected in August, 1958, by a mail vote to fill the vacancy created by the resignation of Earl W. Kintner who had been elected for a 3-year term at the 1956 Annual Meeting in Dallas. Therefore, this vacancy is for a full 3-year term.

Gilbert A. Cuneo was elected at the 1959 Midyear Meeting in Chicago to fill the vacancy created by the absence of Rufus G. Poole from two consecutive meetings of the Council, as provided in Section 8 of Article VI of the By-Laws. Under the provisions of Section 3 of Article VI of the By-Laws, Mr. Cuneo was elected to serve until the end of the 1959 Annual Meeting only. Thus, this vacancy is for the remainder of the term for which Mr. Poole was elected, which ends in 1960, and is, therefore, for a 1-year term only.

Your Nominating Committee calls your attention to Article IV of the By-Laws which provides, in pertinent part, that this Report shall be published prior to the Annual Meeting (Section 1). Further, Section 1 provides that, at the commencement of the first session of the Annual Meeting, the Section Chairman shall orally announce the Report of the Nominating Committee, and after a reasonable interval to be then announced by the Chairman, before the conclusion of that session, additional nominations for any specified position may be made from the floor. Seconds to such nominations shall not be permitted but the nominator must briefly identify the nominee and make a brief statement of his activities in the Section and in the law profession generally. Section 1 also requires the Chairman to announce the time and place when the election shall be held.

Section 2 of Article IV provides that all such elections must be held at the last session of the Annual Meeting. Elections for contested positions must be by written ballot unless otherwise ordered by unanimous consent of all members of the Section present. Further, each position to be filled by election must be voted upon separately and election shall be by majority of the votes cast. A run-off election must be held to choose between the two leading candidates if a majority vote is not initially obtained.

In accordance with Article VI, Section 1, there is set forth below a statement of the activities of each of the nominees proposed by the Nominating Committee, in the Section and in the law profession generally.

Earl W. Kintner

During the current year, Mr. Kintner is serving the Section as Vice Chairman. In the past he has served the Section in various capacities, including membership on the Council. He is a member of the Indiana and District of Columbia Bars. He is the General

Counsel of the Federal Trade Commission and has been nominated by the President to be a member of that Agency. His confirmation as a member of that Agency is now before the United States Senate. Your Nominating Committee has considered whether or not Mr. Kintner's serving as a Member of the Federal Trade Commission and as Chairman of the Section would result in any conflict fo interest. It has had the benefit of correspondence and discussion between its Chairman and Mr. Kintner on this subject. Your Committee has concluded that there would be no necessary conflict of interest as a result of Mr. Kintner's serving both as Chairman of the Section and as a member of the Federal Trade Commission.

Whitney R. Harris

Mr. Harris is currently serving the Section as a member of the Council, having been elected to this office at the 1957 Annual Meeting in New York. He is a past executive director of the American Bar Association and for several years has been an active member of the Section. He is a member of the Bars of California and Texas, is a member of the firm of Gossett, Harris, Denman and Hall of Dallas, Texas, and is Solicitor for Texas for the Southwestern Bell Telephone Company.

Elizabeth C. Smith

Miss Smith is currently serving the Section as its Secretary and has served in that capacity since the 1956 Annual Meeting in Dallas, Texas. She has been a member of the Section for many years. She is a member of the Bar of Oklahoma and is a Hearing Examiner with the Federal Communications Commission.

Donald C. Beelar

Mr. Beelar is a past Chairman of the Section, *ex officio* a member of the Council this year, and has served in the past on important committees of the Section. He is a member of the Bar of the District of Columbia and is a member of the firm of Kirkland, Ellis, Hodson, Chaffetz & Masters, Washington, D. C.

Raoul Berger

Mr. Berger is currently serving the Section as Chairman of the Committee on Agency Rule Making. He has served in the past on

important committees of the Section. He is a member of the Bars of Illinois and the District of Columbia and is engaged in the practice of law in Washington, D. C.

Valentine B. Deale

Mr. Deale is currently serving the Section as Vice Chairman of the National Committee. He has served in the past on important committees of the Section. He is a member of the Bars of Ohio and the District of Columbia, and is engaged in the practice of law in Washington, D. C.

Counts Johnson

Mr. Johnson is currently serving the Section as Chairman of the Annual Meeting. He is a member of the Bar of Florida and is engaged in the practice of law in Tampa, Florida.

Frank E. Cooper

Mr. Cooper is a member of the Detroit law firm of Beaumont, Smith and Harris and is Professor of Law at the University of Michigan. He is the author of several books on Administrative Law and served as consultant to the Hoover Commission Task Force on legal procedure and services. He has been an active member of the Section for several years.

Respectfully submitted,
RUFUS G. POOLE, *Chairman*
BRYCE REA, JR.
FANNEY N. LITVIN

REPORT OF THE COMMITTEE ON ORGANIZATION AND BY-LAWS

The Committee has held two meetings during the past year and has considered subject matter referred from the Council of the Section and from the membership generally.

At its mid-winter meeting in February 1959, the Council indicated that it would be receptive to a suggestion, under consideration by the Committee, that some means be developed for assuring continuity of action in the Section from one administration to another. Additionally, the Secretary of the Section requested that the Committee give thought to provisions for a chairman-elect of the Section and for the election of an alternate Delegate to the House of Delegates. (Minutes of the Midyear Meeting of the Council, Feb. 21-22, 1959, p. 15.)

Other matters which have come to the Committee's attention are: a suggestion for establishment of a committee on complaints within the Section, and a proposal for adoption of a by-law regulating mass mailings in which the stationery of the Section is utilized. These were submitted too late for study and development of a recommendation. They are recorded as unfinished business for the Committee's future consideration and to elicit any comment or views which the Council or membership may care to furnish the Committee.

The Committee wishes to remind the Council: 1) of the resolution adopted at the mid-winter meeting in Atlanta in 1954 and amended in 1955, pursuant to which it is required that information, concerning all committees of the Section which are established or abolished, is to be furnished the Organization and By-Laws Committee and to be kept by the Committee as a record of the history of the Section, and 2) of the outstanding resolution adopted by the Council at the annual meeting in Dallas, calling for a reexamination and report by a committee appointed to study the jurisdiction of section committees.

The Committee's recommendations follow:

1. *Continuity in the operations of the Section.* Under present practices the difficult and time-consuming task of planning a program and of appointing Committee chairmen at the beginning

of each Section year, which must be undertaken by each newly-elected chairman, has resulted in a gap in Section activities, occurring immediately following the annual meeting. To overcome this lag it is recommended that the by-laws of the Section be amended to provide for an additional meeting of the Council which would be held at the time of the annual meeting after the close of the Section meeting. At this meeting plans for the forthcoming year can be discussed. In addition, considerable help can be given the Section Chairman in getting the Section operations underway. It would be appropriate, for instance, to make it known that the membership generally and the officers and Council could submit names of candidates for committee chairmen for consideration at this meeting. The candidates suggested could be evaluated and likely names could then be turned over to the section chairman as a list of choices for his use in making appointments.

To implement the foregoing, the Committee recommends approval of the following resolutions:

> *Resolved* that Article VI, Section 7 of the By-Laws of the Section of Administrative Law be amended to read as follows:
>
> Section 7. The Council shall hold *three* regular meetings each year, the first to be held *immediately following the annual meeting of the Section, the second to be held* in connection with the mid-year meeting of the House of Delegates, and the *third* to be held prior to the annual meeting of the Section. *At the first regular meeting the newly-elected officers and Council members shall meet with the Council to discuss the program for the coming year and to consider and advise with the Chairman concerning candidates whose names are submitted to the meeting for his selection in making appointments to Section committees for the coming year.* Special meetings of the Council may be called upon reasonable notice by the Chairman with prior approval of a majority of the Council, and shall be so called upon written request by a majority of the Council.

2. *Chairman-elect of the Section.* The Committee has examined the pros and cons of this suggestion. It seems that it would be advantageous to the continuity of operations in the Section to have the incoming chairman qualified with a year's knowledge of the work which he is to direct. The experience and knowledge he gains ahead of time would otherwise be lost. The Committee feels, however, that there are some disadvantages. One of these may be the creation of a type of lame-duck status for the chairman, which serves to reduce his effectiveness during his term in

office. It is recommended, therefore, that the suggestion be held in abeyance until we learn more of the Association's experience in its use of the new arrangement providing for a president-elect.

3. *Alternate-delegate of the Section to the House of Delegates of the Association.* The Committee explored the possibilities of this suggestion. It would provide for a substitute delegate who could be recognized to represent the Section in the House if the regularly elected delegate is absent or otherwise indisposed. There is no prohibition against such a provision in the Association Constitution nor, so far as is known, in the rules of procedure of the House of Delegates. The fact is, however, that no section or organization in the House of Delegates has an alternate delegate. In order to learn the reason why the alternate system is not used, the Committee carried its research to the Executive Director of the Association, Joseph D. Stecker. He advised by long-distance telephone that the policy of the House of Delegates does not permit recognition of an alternate on the floor of the House. Presumably, this is for the reason that in such a large body confusion would be created by the appearance on the floor of persons other than the duly recognized representatives and by the resulting necessity for requiring credentials.

The Committee recommends no further action on this suggestion unless in the discretion of the Council it is felt to be appropriate to raise the question by recommending a change in the rules of procedure in the House of Delegates.

PATRICIA H. COLLINS, *Chairman*

Mr. George C. Dreos, Vice Chairman of the Committee, while not disagreeing with the majority report, feels that the proposal for amending the By-Laws should be carried further. He would amend the By-Laws to provide that all committee officers and members continue to hold their positions and membership in committees following the close of the Section year, until the incoming Section Chairman has appointed new Committee Chairmen and named new committee members.

REPORT OF THE COMMITTEE ON PUBLIC CONTRACTS

In the summer issue, 1958, of the Administrative Law Bulletin, Pages 194-95, a list was given of the projects before the Committee. Those projects were: requiring full and complete findings of fact to be made by contracting officers; the extent to which contracting officer retains jurisdiction of a dispute after appeal is taken; elimination of multiple appeals; remanding by boards to contracting officer for settlement without adequate instructions; revision of provision in disputes clause of Corps of Engineers Board of Contract Appeals for military construction that appeal from its decision vacates the decision; and hearing of appeal on liability and quantum at the same time. The projects are still undisposed of and require continuing efforts before the boards and the contracting agencies in an effort to improve the efficiency and reduce the expense in the adjustment and settlement of disputes involving questions of fact arising under government contracts.

Two additional matters of importance occupied the attention of the Committee.

The first related to procedures initiated by the Deputy Assistant Secretary of the Army, Logistics, with respect to appeals before the Armed Services Board of Contract Appeals. Those appear in the printed hearings before Subcommittee for Special Investigations of the Committee on Armed Services, House of Representatives, in its inquiry into the Administration and Operation of the Armed Services Board of Contract Appeals, 85th Congress, 2nd Session.

Those procedures included instructions to the Board limiting the awards to the amount claimed. The Committee felt the Board's decision should properly reflect the amount due from the evidence.

Another procedure authorizes the Chief of a technical service after a motion for a reconsideration has been denied by the Board to forward the case to the Secretary with a view to determining the propriety of having the Comptroller General pass upon the claim. The Committee considered that such disregards the effect of the standard disputes article and would unnecessarily delay and perhaps block payment of a claim duly allowed by the Board. The

Committee made its view known to the Deputy Assistant Secretary, who gave assurances that such procedure would be judiciously and very likely sparingly used.

Second, Committee members conferred with representatives of the staff of the Joint Committee on Internal Revenue Taxation considering extension of the Renegotiation Act, advance the principles contained in the resolution of the Association under date of February 20, 1956, as follows:

> "*Resolved,* That the American Bar Association recommends to the Congress the enactment of legislation (a) recognizing the adversary character of proceedings before the Renegotiation Board and (b) providing a greater degree of procedural due process for contractors who are parties thereto.
>
> "*Resolved Further,* That the Section of Administrative Law is authorized to represent the Association (a) to advance and support such legislation and (b) to advance and support appropriate changes in the Board's procedural rules and practices to meet more adequately the requirements of procedural due process."

A statement was also presented to the House Ways and Means Committee in support of the principles embodied in the resolution. Efforts are continuing to obtain a greater degree of procedural due process in renegotiation proceedings.

KAHL K. SPRIGGS, *Chairman*

REPORT OF THE COMMITTEE ON PUBLIC INFORMATION

The Public Information Committee deems it advisable to alter the usual format in submitting this report because of the recent trend in Congress during the past three years to incorporate in legislation specific information provisions. Many lawyers fail to realize the importance of access to information and records until they are actually faced with refusals or withholding of data necessary to them in their daily practice before Federal Administrative Agencies. Therefore to assist lawyers, pertinent information provisions in recently enacted legislation and reports will be quoted in this report.

New Legislation Enacted

On August 12, 1958 the President signed into law an amendment to the housekeeping statute which reads: "This section does not authorize withholding information from the public or limiting the availability of records to the public." (R.S. section 161, 5 U.S.C. 22 P.L. 85-619, 72 Stat. 547.) John W. Cragun, Chairman of the Ad Hoc Committee on the Administrative Code testified in favor of this amendment for the A.B.A. The first judicial decision referring to this amendment is contained in *Mitchell* v. *Roma et al* No. 12780, April 14, 1959 (3 C.A.) 14 WH Cases 128 wherein the court stated: "At the argument before this court the plaintiff abandoned his former reliance on the Housekeeping Statute but pressed the general informer's privilege and our opinion will revolve on this ground."

Public inspection of *applications* which serve as a basis for granting tax exemption to organizations became effective as part of the Technical Amendments Act of 1958, Public Law 85-866. The intent of Congress concerning this subject matter was set forth in the Senate report as follows:

> "Your committee agrees with the House that making the applications available to the public will provide *substantial additional aid* to the Internal Revenue Service in determining whether organizations are *actually operating* in the manner in which they

have stated in their applications for exemptions." (S. Rept. 1983, July 25, 1958.) (Italics added.)

The Treasury Department estimated there were more than 100,000 organizations affected by this law and its files became open for inspection on November 3, 1958. Section 75 entitled "Publicity of Exempt Organization Information" contains the specific language which should be of interest to all lawyers.

On July 29, 1958 the President signed Public Law 85-568 which created a new civilian agency of government called the National Aeronautics and Space Administration. Section 303 of this law is entitled "Access To Information" and reads as follows:

> "Information obtained or developed by the Administrator in the performance of his functions under this Act shall be made available for public inspection, except (A) information authorized or required by Federal statute to be withheld, and (B) information classified to protect the national security: Provided, That nothing in this Act shall authorize the withholding of information by the Administrator from the duly authorized committees of the Congress." In House Report No. 1770, May 24, 1958, the Select Committee on Astronautics and Space Exploration on P. 23 set forth the intent of Congress as follows:
>
> "It was the desire of the select committee to include in the bill a positive affirmation of Congress' intent that the people be enabled to know what is going on in their Government, subject, of course, to national security restrictions."

It is interesting to note that the intent of Congress as set forth when this law was enacted has recently been utilized by the Government in a brief in a libel case (*Barr* v. *Madigan and Matteo*) before the Supreme Court this Spring.

The members of the Administrative Law Section should be interested in another law enacted by the 85th Congress concerning Weather Modification Research. In Public Law 85-810 there is a new information section which reads:

> "(4) Information contained in any statement, report, record, or other document furnished pursuant to this subsection shall be available for public inspection, except (A) information authorized or required by statute to be withheld, and (B) information classified in accordance with law to protect the national security. The foregoing sentence shall not be interpreted to authorize or require the publication, divulging, or disclosure of any information described in section 1905 of title 18 of the United States Code,

except that the Director may disclose information described in such section 1905, furnished pursuant to this subsection, whenever he determines that the withholding thereof would be contrary to the purposes of this section and section 3(a) (9) of this Act."

House Report 1695 explains the new information provision which places the burden of proof on the Federal official who determines that a specific item of information should be withheld. The Public Information Committee desires to call to the attention of the members of the section a unique statement in the report which could have considerable significance in the field of administrative law. The report states:

"It is important to have the widest possible dissemination of information on weather modification, both to the public and to scientists working in this field, although it is realized that it may be necessary in some instances to withhold certain information from public disclosure. The committee feels, however, that any person who makes information available under the new section 14 which the bill proposes to add to the National Science Foundation Act should have the privilege of filing with the Director written objection to making information available for public inspection, stating the ground for such objection. In such a case the Director should determine whether the objection is well founded. If he finds that the objection is well founded and that the information should be withheld from public inspection, *he should render a decision to that effect, citing the statutory authority for his determination, and in addition, he should make his decision available for public inspection.* (Italics added)."

Pending Legislation

S. 186 introduced by Senator Hennings on January 12, 1959 amends section 3 (Public Information) of the Administrative Procedure Act. Senator Hennings has written an article entitled "A Legislative Measure To Augment The Free Flow Of Public Information" (Vol. 8 American Law Review 19) which thoroughly explains the purpose of the amendment. The Bill has been referred for legislative action to the new Senate Subcommittee on Administrative Practice and Procedure, of the Judiciary Committee. (Carroll Subcommittee).

S. 1070 introduced by Senator Ervin for himself and Senator Butler on February 16, 1959, recodifies and amends the Admin-

istrative Procedure Act. This is the A.B.A. "Code of Federal Administrative Procedure" and has also been referred for legislative action to the new Senate subcommittee.

For the first time in Federal Administrative Practice both of the above mentioned Bills set forth what should be in a "Public Record" although they are slightly different in language.

S. 600 was introduced by Senator Hennings, for himself and Senator Wiley, on January 20, 1959 to establish an "Office of Federal Administrative Practice." This Bill was also referred to the new Senate subcommittee. The Bill provides for a Director of Federal Administrative Practice and along with other duties requires him to:

> "(3) Carry on continuous studies of the adequacy of public information practices and procedures of the agencies related to rulemaking and adjudication;" The Public Information Committee strongly endorses this requirement particularly with respect to the multitudinous "rules and regulations" which emanate daily from the Federal Government. This committee believes that a "uniform public information rule" should be put into effect without undue delay.

A companion Bill to S. 600 was introduced in the House by Congressman Dante B. Fascell on May 12, 1959. It is H.R. 7092 and was referred to the House Judiciary Committee.

Companion Bills for S. 186 and S. 1070 have not been introduced in the House of Representatives. However Congressman John E. Moss originally introduced H.R. 7174 in the 85th Congress and S. 186 of the 86th Congress is identical. The Public Information Committee deeply appreciates Robert M. Benjamin and his Special Committee on the Administrative Code for submitting the comments on S. 186. These comments have been given to Congressman Moss and it is possible he will introduce a revised Bill concerning Section 1002 (Public Information) of the A.P.A. during this session of Congress.

S. 671 introduced by Senator Javits, for himself and Senator Keating, on January 23, 1959, amends the A.P.A. to provide for the disclosure of certain communications received by government agencies from members of Congress with respect to adjucatory matters. This Bill was also referred for legislative action to the Carroll Subcommittee.

As of the date of this report (June 24, 1959) no legislative action has been taken on any of the above-mentioned Bills.

Executive Privilege

The present Attorney General is the promoter of the new term "Executive Privilege" and members of the A.B.A. are familiar with his thinking as set forth in an article entitled "Constitutional Law: The Papers Of The Executive Branch," 44 A.B.A.J. 941 (1958). Professor Bernard Schwartz wrote an article entitled "A Reply To Mr. Rogers: The Papers Of The Executive Branch," A.B.A.J. Vol. 45 No. 5 (May 1959).

All members of the section should obtain for their library a copy of Vol. 19, No. 1, *Federal Bar Journal* (Jan. 1959) because the entire issue is entitled "Executive Privilege: Public's Right To Know And Public Interest." This is a pro-and-con discussion on the subject.

A major item of legal interest to the members of the section is the fact that the Secretary of Defense promulgated a Directive in July 1958, (D.O.D. 7650.1) which did not rely on statutory authority. On the basis of this Directive the Secretary of the Air Force refused the General Accounting Office access to an Inspector General's Report entitled "Survey of Management Of The Ballistic Missile Program." The Secretary justified his refusal claiming "Executive Privilege" and the D.O.D. Directive.

The Secretary of the Navy also refused the General Accounting Office access to a report by a Procurement Review Group of the Office of Naval Materiel entitled " A Review of Procurement Operations in the Military Sea Transportation Service, October 1957." Again the Secretary of the Navy based his refusal on the claim of "Executive Privilege" and the D.O.D. Directive.

The House Committee on Government Operations, H. Rept. 234 86th Congress, 1st Sess., P. 83 stated:

> "The Air Force refusal to the Comptroller General is based solely on a marked claim of 'Executive Privilege.' The Constitution grants no such authority nor has the mythical doctrine of privilege been supported by the courts. The refusal not only violates the duly enacted law of the land but also is contrary to a specific constitutional requirement (Art. II, Sec. 3) that the President 'shall take care that the laws be faithfully executed.' No executive act can modify, amend, or contravene a statute. Laws can be amended only in the way they were enacted. Any attempt by the Executive to alter or supersede the law does violence to the Constitution."

Query: have we arrived at an impasse in our democratic system of government wherein a claim of "Executive Privilege" cannot be tested in our courts?

During the Senate debate on the confirmation of Admiral Strauss, Senator O'Mahoney, an authority on Constitutional law stated:

> "When any branch of the Government is dealing with subjects having to do with the appropriation of money, the expenditure of money, or the action by executive authority in the field which constitutionally is covered by legislative authority, there is no such thing as executive privilege." (Cong. Record, June 16, 1959, P. 9944).

Code of Ethics Or Standards Of Conduct

The great clamor and demand for a Code of Ethics, both in and out of Congress, followed the sensational revelations of the Legislative Oversight Subcommittee and abuse of administrative procedure. The Public Information Committee believes (1) that it is impossible to effectively legislate on morals; (2) that 95 percent of the problems can be cured by requiring that *all* communications, exparts, verbal, written or otherwise, be made part of the "public record"; (3) that if any law or statute is to be enacted it should be done as an amendment to the A.P.A.; (4) that before any such code, penal or otherwise, both the A.B.A. and Congress should define and state what should be in the "Public Record."

As of this date there is no definition of the term "Public Record" set forth in a law or statute in the field of Administrative Law, hence the Committee feels such a requirement is mandatory before any other legislative action is taken relative to ethics or morals.

John J. Mitchell, *Chairman*

REPORT OF THE SECURITIES COMMITTEE

In the fall of 1958 the Committee resumed operations, with substantially the same membership as in the preceding year. Again this year the Committee has devoted its attention largely to the practice and procedure aspects of the legislative program of the Securities and Exchange Commission.

The Administrative Law Section, at its Annual Meeting in Los Angeles, approved two resolutions sponsored by the Committee (see Bulletin, Vol. 10, pp. 205-218; Vol. 11, pp. 50-51). Resolution No. 1 opposed (a) the Commission's proposed amendment of the Securities Act designed to overrule *Jones* v. *S. E. C.,* 298 U.S. 1 (1936) and to give the Commission virtually unlimited authority to prevent withdrawal of a registration statement, and (b) its proposed amendments of the Securities and Exchange Act of 1934 and the Investment Advisers Act of 1940 to permit withdrawals of applications for registration as a broker-dealer and an investment adviser, respectively, only with the consent of the Commission if the withdrawal application is filed after a denial proceeding has begun.

The resolution also proposed that the three Acts be amended to recognize an unlimited right of withdrawal of a registration statement or application for registration before the Commission has given notice that it has begun proceedings looking toward denial or suspension of effectiveness, and a right of withdrawal after such notice unless the Commission, promptly after an application for withdrawal is filed, issues an order prohibiting withdrawal which contains or is accompanied by findings in support of a determination that withdrawal would be contrary to the public interest or the protection of investors. The Commission had also proposed to amend Section 8(b) of the Securities Act and Section 305(b) of the Trust Indenture Act of 1939 to give the Commission authority anytime before the effective date of a registration statement to postpone effectiveness for up to 15 days pending a hearing on whether to refuse effectiveness. Committee Resolution No. 2, approved by the Section, opposed such an extension of the Commission's authority.

The 85th Congress closed with no action having been taken on the Commission's program. Thereafter, the Commission undertook a review of its program and its Staff consulted further with various bar and industry representatives. Representatives of this Committee conferred with Commission Staff representatives on October 17 and December 13, 1958. In January and February of this year, bills were introduced in the House of Representatives and the Senate, respectively, embodying the Commission's revised legislative program. The prior proposed amendment of the Securities Act which would have expanded the Commission's authority to prevent withdrawal of a registration statement was omitted by the Commission. However, it did not abandon the corresponding proposed amendments of the 1934 and 1940 Acts. Similarly, the proposed amendment of Section 8(b) of the Securities Act with respect to postponement of effectiveness was dropped but a corresponding provision under the 1939 Act was retained.

At the February mid-year meeting of the Association in Chicago, the Section's resolutions went forward to the Board of Governors, which recommended their adoption. On February 23, 1959, the House of Delegates of the Association approved the resolutions, with no opposition thereto being expressed on the floor of the House.

By its action the House of Delegates has put the Association on record against any attempt now or in the future to expand the authority of the Commission to prevent withdrawals under any of the three Acts. Of equal importance is the fact that the resolution proposes that all three Acts be amended to establish standards which will tend to insure that the Commission acts fairly whenever it seeks to bar withdrawal of a registration statement or application for withdrawal.

The Securities Subcommittee of the Senate Banking and Currency Committee and the Commerce and Finance Subcommittee of the House Interstate and Foreign Commerce Committee have scheduled hearings during June of this year for consideration of the Commission's legislative program. The two resolutions adopted by the House of Delegates authorize and direct the Administrative Law Section to appear before the appropriate committees of Congress in support of such resolutions. The Chairman of the Section has directed the undersigned to appear and state the Association's position. The Committee Staffs have indicated that an opportunity to appear and be heard will be afforded.

The current bills (S. 1179 and H.R. 2480) to amend the Securities Exchange Act of 1934 sponsored by the Commission include a provision that any person who fails to file "information, documents, or reports" pursuant to that Act or any regulation thereunder shall forfeit $100 for each day such failure to file continues beyond the time prescribed for filing or beyond any extension granted by the Commission; such forfeiture would not be in lieu of any criminal penalty and would be recoverable in a civil suit brought by the Commission in its discretion on behalf of the United States. Upon being informed of this provision, the Council of this Section at its mid-year meeting recorded its opposition in principle to such form of civil penalty.

C. Roger Nelson, *Chairman*

REPORT OF THE STATE ADMINISTRATIVE LAW COMMITTEE

During the year now ending the State Administrative Law Committee has attempted to keep current and to expand the files initiated last year relating to State Administrative Procedure Legislation, enacted or proposed, in the separate states. Although appreciable progress has been made in this regard, so that the Committee may have a useful source of information for its own use and use of members of the Association in the various states where legislation is contemplated, much is yet to be done.

This Committee is still hampered by organizational problems and a lack of adequate representation to assume responsibility in connection with each of the separate states. In this connection, it is recommended that the Section of Administrative Law authorize this Committee to contact, with such aid as may be available through the central offices of the American Bar Association, the chairmen of the Administrative Law Committees of the various State Bar Associations and to undertake to set up liaison directly between your committee and the various committees of the individual State Bar Associations. It is believed that, in this manner, your Committee may function much more efficiently both in securing full and current data regarding State Administrative Law problems in the various states and also in making available helpful information to those state committees in a field where coordinated data is not easily available to them for their use.

The National Conference of Commissioners on Uniform State Laws is undertaking the drafting of a revised Model State Administrative Procedure Act. This committee has contacted the National Conference offering to be of any assistance which may be desired in connection with that undertaking. During this year, however, no action by this Committee has been requested, but it is hoped that there may be an opportunity to cooperate on this project.

It remains the belief of this Committee that the average lawyer has an increasing contact with problems of administrative law at the state level and, therefore, an increasing concern with the state

administrative function. It is therefore hoped that the housekeeping problems of this Committee may receive sympathetic consideration and that, as a step in the proper direction, the recommendation made at the outset of this report may have favorable consideration.

FREDERIC L. KIRGIS, *Chairman*

MINUTES OF THE MIDYEAR MEETING OF THE COUNCIL

EDGEWATER BEACH HOTEL—CHICAGO, ILLINOIS
FEBRUARY 21-22, 1959

The Council meeting began with a luncheon at 12:00 o'clock noon, on February 21 and the last session was concluded at 3 P.M., on February 22, 1959.

Attendance: All officers and members of the Council were present [1] during the meeting, except John W. Cragun, Council Delegate, who was absent due to illness and pursuant to doctor's orders. In addition, approximately 25 other members of the Section, including a number of Committee Chairmen, were in attendance.

1. *Distribution of Agenda*

2. *Minutes*

Minutes of the Annual Meeting of the Council held in Los Angeles on August 23-24, 1958, minutes of the mail vote taken in August 1958 to fill the vacancy on the Council created by the resignation of Earl W. Kintner and the mail vote of February 4, 1959 to fill the vacancy caused by the resignation of Arnold Levy were approved.

3. *Vacancy on Council*

Chairman Gage announced that he had received a wire from Rufus G. Poole, stating that he would not attend the Council meeting. Mr. Gage then stated that, since Mr. Poole had not attended the meeting of the Council at the Annual Meeting in Los Angeles, his absence from this meeting created a vacancy under

[1] Rufus G. Poole, Council member, was absent for the second consecutive time and, thus, under Section VI, Article 8, of the By-laws of the Section, the position automatically became vacant. Gilbert A. Cuneo was elected by the Council to fill the vacancy and to serve until the end of the next Annual Meeting. Mr. Cuneo attended all sessions of the meeting.

Article VI, Section 8, of the By-laws of the Section. The Chairman then asked for nominations to fill the vacancy. Charles E. Long, Jr. thereupon nominated Gilbert A. Cuneo and Robert M. Benjamin nominated Bernard J. Gallagher to serve as a member of the Council until the close of the next Annual Meeting of the Section. Pursuant to motion duly made and adopted, nominations for the Council vacancy were closed. Members of the Council then voted by written ballot, with the following result:

Gilbert A. Cuneo	10 votes
Bernard J. Gallagher	4 votes
Raoul Berger (write-in)	1 vote

Gilbert A. Cuneo was declared duly elected as a member of the Council, to serve until the close of the next Annual Meeting of the Section, as provided in Article VI, Section 3, of the By-laws.

4. *Consideration of Code of Agency-Tribunal Standards of Conduct*

John B. Gage, Chairman, spoke briefly relative to the appointment and work of the Committee on Code of Agency-Tribunal Standards of Conduct and the Provisional Report of the Section, and referred to the transmittal of the committee's report and recommendations, in the form of a Provisional Report of the Section to the Board of Governors. He reported that President Malone had thereafter advised him that it was the opinion of the Board of Governors that the code which the Section had been directed to write, pursuant to the resolution adopted by the House of Delegates at Los Angeles, was to be confined to agency adjudicatory proceedings and did not include general rule making.

It was pointed out that the Atlanta resolution relative to this matter was amended on the floor by the addition of the word "adjudicative," pursuant to an amendment offered by a member of the House of Delegates, and that the Los Angeles resolution was in furtherance of the objectives of the Atlanta resolution.

Harold L. Russell—both as a Council member and as a member of the committee appointed by the Chairman of the Section to draft a code of conduct for consideration of the Council—stated his disagreement with the interpretation of the scope of the proposed code placed upon the Los Angeles Resolution by the Board of Governors and the President of the Association. He stated his opinion that the code was not to be restricted to adjudicatory pro-

ceedings only and, in this connection, pointed out that while the "Whereas" preamble did refer to adjudication, such preamble was stricken when it was adopted by the House of Delegates. He urged that the proposed code should apply to rule making as well as to adjudication.

Robert M. Benjamin, Council member, defended the interpretation placed upon the resolution by the Board of Governors and referred, again, to the amendment offered in Atlanta restricting the scope of that resolution to adjudicatory proceedings. He further pointed out that the Council should be realistic and understand that it must accept the Board of Governors' ruling if anything was to be accomplished now.

Hans Klagsbrunn, a member of the code drafting committee and a former member of the Council, expressed his agreement with Harold Russell, i.e., that the proposed code should not be restricted to adjudication only. He also expressed the opinion that the interpretation of the Board of Governors as to the scope of the resolution adopted by the House of Delegates at Los Angeles does not control the action of the Council.

Chairman Gage referred to Article III of the Constitution of the United States and interpretations placed thereon with respect to certain courts.

Donald C. Beelar, a member of the Council, stated that the definition of adversary proceeding is the least of his problems—that the real problem is to provide that cases be decided on the record and such problems cannot be treated by definition. He further stated that the code proposed by the drafting committee was too broad and that under legislation of that kind agency people would "clam up." He also challenged the right to disbar attorneys which is given agencies in the committee draft and pointed out that under other bills approved by the American Bar Association, it is necessary to go to court to get such disbarment.

Judge Peck, Chairman of the drafting committee, agreed that "adjudicatory" may be substituted for "adversary" or "adversary-adjudicatory," as had been suggested. In reply to Mr. Beelar, Judge Peck suggested that rules may be made by agencies to cover some of the difficulties which he had pointed out.

Earl W. Kintner, Vice-Chairman of the Section, stated his agreement with the position of Mr. Beelar and his belief that the Beelar draft is realistic.

Harold Russell, speaking, as he said, both as a member of the

drafting committee and of the Council, disagreed and stated that Mr. Beelar had overlooked the "Provided, however" proviso in the committee draft. Mr. Beelar replied that he was violently opposed to the "Provided, however" portion of the draft. Mr. Russell then moved that the Council adopt the report and code proposed by the drafting committtee and submit it to the House of Delegates. The motion was seconded by Frederic P. Lee.

Robert H. Young, a Vice-Chairman of the Gas and Electric Power Committee, said that the drafting committee proposal had been sent to all members of his committee and that they were unanimous in opposition to it in its present form.

Whitney R. Harris said that we are now up against decision and must act; and that, as between the committee draft and the Beelar draft, the Beelar one is superior in his opinion. John Mitchell suggested that "public files" be defined. Gilbert Cuneo, a member of the Council, inquired whether the code as proposed by the drafting committee includes Board of Contract Appeals cases, since the decisions in such cases are not required to be based on the record. Chairman Gage commented that decisions in many other matters are not required to be based on the record.

Donald C. Beelar moved as a substitute motion that the Council adopt his revised draft of February 20, 1959, to be put in the form of an independent bill. The motion was seconded by Earl W. Kintner.

Frank C. Newman commented generally and said that he would like to have a rational discussion of the two proposals. Hans Klagsbrunn stated his opinion that the Beelar draft had numerous inconsistencies and incongruities.

Valentine B. Deale, a member of the Council, stated that he was in an awkward position since he had been a consultant to the drafting committee and was also a Vice-Chairman of the Federal Administrative Practice Act Committee. However, upon consideration of the Beelar approach, he likes it much better—as between the two approaches—than that of the drafting committee.

While the members of the Council and other members of the Section present would like to have discussed the matter further, in view of the time limitation imposed by the necessity of reporting to the Board of Governors by 3 o'clock P.M., the question was called for on the Beelar motion. Mr. Beelar read the draft of the subject of his motion. Mr. Benjamin spoke against the Beelar motion, urging that the reading of the draft brought out the im-

possibility of handling it in this manner. The matter was put to a vote and the Beelar motion was adopted, with a vote of 9 for its adoption and 6 against.

Chairman Gage then appointed a committee to recast the draft adopted by the Council in the form of a single bill. The committee was composed of Judge Peck as Chairman, Donald C. Beelar, Frank C. Newman and Whitney R. Harris. The committee was instructed to transmit the proposed code to the Board of Governors by 3 P.M. It was announced later in the afternoon that the Board of Governors had approved for submission to the House of Delegates the draft of the code of standards of conduct adopted by the Council.

The resolution transmitted to the House of Delegates is as follows:

Be It Resolved By The American Bar Association, That the Association recommends to Congress the enactment of Agency Tribunal Standards in adjudicatory proceedings by and before Federal administrative agencies consistent with the principles set forth in the following draft of proposed legislation: [2]

> *"Be It Further Resolved,* That the Special Committee on Legal Services and Procedure (or, at its election, its Committee on the Federal Administrative Practice Act) and the Section of Administrative Law are authorized and directed by the House of Delegates to urge the enactment into law of the proposed Code of Agency Tribunal Standards of Conduct, or its equivalent in purpose and effect, and, in so doing to appear before the proper committees of Congress."

Standards of Conduct for Agency Hearing Proceedings of Record

Sec. 1. *Hearings of Record.* In any proceeding before an agency which is subject to notice and opportunity for hearing and is required by law to be based upon a hearing record, the agency's determination and decision of such proceeding shall be based solely and exclusively upon the pleadings, evidence and contentions of record in the proceeding. Such hearings of record shall include adjudications, hearings of record which by law are made subject to the procedure governing adjudications and those hearing proceedings which in the agency's notice of hearing are made subject to the standards of conduct of this Act. Such standards of conduct shall not apply to agency actions which are administrative or executive in character; to administrative rulings or interpretations not subject to notice or hearing; to investigations; or, to

[2] This resolution was adopted by the House of Delegates on February 23, 1959 with the following amendment added:

rule-making proceedings, except where the agency's public notice in its lawful discretion states that the particular proceeding is subject to the provisions of this Act. The notice of hearing in each agency proceeding shall state whether it is or is not subject to this Act.

Sec. 2. *Agency Hearing Officer.* It shall be unlawful for any agency hearing officer or agency member who presides over or participates in the decision or conduct of a hearing proceeding subject to Section 1 of this Act to permit, receive, entertain or consider any ex parte, private interview, argument, or communication intended to influence his consideration or decision of such proceedings, except in circumstances authorized by law or upon reasonable notice to all parties of record.

(a) In the event any such interview, argument, or communication is received, after the proceeding has been noticed for hearing, contrary to this Section, the hearing officer or agency member shall promptly make the communication, if written, or a true summary, if oral, and a statement of the incident a matter of record in the public files of the agency with notice thereof to all parties. Any such incident may be cause for disqualification, censure, suspension or removal from office, unless the matter is determined on the record to be inconsequential to a fair and impartial trial and decision of the proceeding. A wilful violation of this Section shall be subject to a fine of not more than $10,000 or imprisonment for not more than one year or both.

Sec. 3. *Influence.* It shall be unlawful for any person, with intent to influence the consideration or decision of a proceeding after it has been noticed for hearing, subject to Section 1 of this Act, to communicate directly or indirectly, privately or ex parte, with any hearing officer or agency member subject to Section 2 of this Act, concerning such a proceeding which is pending before the agency, except in circumstances authorized by law or upon reasonable notice to all parties of record.

(a) In the event any such communication is undertaken, or attempted, contrary to this Section, the hearing officer or agency member involved shall promptly make the communication, if written, or a true summary, if oral, and a statement of the incident a matter of record in the public files of the agency with notice thereof to all parties. An inquiry may be made of the matter and unless it is determined on the record to be inconsequential to a fair trial and decision of the proceeding, appropriate disciplinary action shall be initiated according to law. A wilful violation of this sub-section shall be subject to a fine of not more than $10,000 or imprisonment of not more than one year, or both.

(b) Violation of this Section by any party to the proceeding or by any one acting for or in his behalf, shall be good cause, in the agency's discretion, for disqualification of such party.

5. *Action of Board of Governors on Section Report*

Chairman Gage then reported on the action of the Board of Governors with respect to the other items on the Section's Report [3] to the House of Delegates:

The Board of Governors did not approve Item 1 in its present form. (The basic bill—S.2036, 85th Cong.—has not been reintroduced in the present Congress.)

The Board approved Items 2, 3 and 4 of the Report of the Section for submission to the House of Delegates.

The Board referred Items 5 and 6 back to the Section for definitive legislative proposals—with direction that exceptions be provided in any legislation drafted in connection with Item 5.

The Board did not approve Items 7, 8 and 9 for submission to the House of Delegates, suggesting that there be further coordination of the subject matter with the Standing Committee on Aeronautical Law.

Earl W. Kintner moved that the Council accede to the Board of Governors' recommendation as to Items 1, 5 and 6 and that the Council refer the matters back to the appropriate committees for early consideration and report. The motion was duly seconded and adopted.

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[3] Item 1 of the Section's Report is a resolution which originated in the Judicial Review Committee and relates to correction of military records. The text of such resolution is found on pages 6-7, footnote 4, of the Minutes of the 1958 Annual Meeting of the Section held in Los Angeles.

Item 2 of the Section's Report is a resolution which originated in the Mobilization Committee and the text thereof is found on pages 7-8, footnote 5, of said Minutes.

Items 3 and 4 of the Section's Report are resolutions which originated in the Securities Committee and the texts thereof are found on pages 9-10, footnote 6 and footnote 7, respectively, of said Minutes.

Items 5 and 6 of the Section's Report are resolutions which originated in the Immigration and Nationality Committee and the texts thereof are found on pages 12-13, footnote 9 and footnote 10, respectively, of said Minutes.

Items 7, 8 and 9 of the Section's Report are resolutions which originated in the Aviation Committee and the texts thereof are found as items "No. 3, No. 4 and No. 5" of the Provisional Report of the Section, August 1958, reported in 10 Ad. Law Bull. 225 and 226.

At the request of Harold Russell, it was agreed to defer Council action relative to Items 7, 8 and 9 until 10:30 A.M., Sunday, February 22. On Sunday morning Mr. Russell gave a brief resume of the history of these three resolutions of the Section, reminding that they had been to the Board of Governors a couple of times already without getting past the Board, and stated that it is now his understanding that the Standing Committee on Aeronautical Law will study the matter and report to the Board of Governors before its May meeting. He, thereupon, moved that the Section accede to the recommendation of the Board of Governors with instructions to the Chairman of the Section that steps be taken to insure action by the House of Delegates in August or by the Board of Governors before that time; emphasizing that this is necessary if either matter is to receive active Congressional action this session. The motion was seconded by Mr. Kintner and adopted.

Kenneth Teasdale moved that Harold Russell be named *pro tem* representative for this Midyear Meeting of the House of Delegates on Aviation matters. The motion was seconded by L. Clair Nelson, and adopted.

6. *Institute on Administrative Problems*

Gilbert A. Cuneo, as Chairman of the Information and Education Committee, reported on the highly successful First Institute on Practical Problems of Federal Administrative Agencies, which was held in Washington, D. C. on December 11-12, 1958, under the sponsorship of the Section of Administrative Law. A summary of the panel discussions and the remarks of one luncheon speaker, Hon. David W. Kendall, will be printed in the next issue of the Bulletin. The address of Hon. Robert L. Stern, the other luncheon speaker, will be published in a forthcoming issue of the American Bar Journal.

7. *Bibliography Project*

Frank C. Newman reported on the status of the bibliography project on which he has been working and distributed a sample outline (on CAB). This project grew out of the belief that there should be some source which would tell how to get information with respect to the various agencies of the Government. He be-

lieves that the book, when compiled, should cover all agencies of whatever size. Mr. Teasdale inquired whether it was proper to cover reference data only. Professor Newman stated that this brought us to the decision which must now be made, i.e., the scope of work to be covered. Comments on the sample pages distributed were requested. It was the consensus of the Council that the sample pages were excellent. Mr. Benjamin, however, suggested that annual reports to Congress were in a different category than reported cases and Mr. Russell suggested that code reference to basic statutory authority should also be included. Mr. Denning was in agreement with Mr. Russell and mentioned helpful pamphlets which are sometimes available. Mr. Russell further commented that in the periodical category it was not worthwhile to run down all articles. Professor Newman then reminded that Yale University has an "index to non-indexed periodicals." Mr. Kintner expressed the thought that the data would be very valuable to practitioners, particularly the periodical articles, since both sides would be presented. He also referred to the periodicals of specialized Bars, such as the Federal Power Bar, Federal Communications Bar Association and ICC Practitioners. Chairman Gage inquired whether it would be feasible to describe the articles and Professor Newman said that he did not feel that would be practical. Professor Newman said that when a department such as the Department of Agriculture is surveyed, it will be handled by units. Mr. Cuneo suggested that names and addresses of publishers should be added to authorities listed and Mr. Deale suggested that place where material can be found should also be shown.

The discussion then turned to the cost of the project. Professor Newman stated that we must, at the outset, underwrite a letter to General Counsels, specific Bar Associations, agencies, et al. Mr. Nelson suggested that the draft be sent out to all agencies for purposes of completeness. Mr. Newman emphasized that in any such distribution he wants to be sure that it is labeled as a preliminary draft and expressed the thought that it must be printed and not mimeographed. Chairman Gage stated that it was his belief that we should underwrite this project and get necessary authorization from headquarters as to fees. Professor Newman inquired whether it will be used. Mr. Kintner stated that it would certainly be used and would be a most important tool to

practitioners. Mr. Benjamin suggested that it be given to Section members free. Mr. Stephan said that much of the material is generally available and that it would be desirable to implement it with something else.

It was the consensus of the Council that the project should be continued and Mr. Teasdale moved that a committee be appointed to aid Professor Newman in formulating the plan and format for the bibliography project. The motion was seconded by Mr. Cuneo and adopted. Pursuant to the motion, the Chairman later announced the appointment of the following committee: Rufus G. Poole, Chairman, L. Clair Nelson, and Hans Klagsbrunn or his designee.

L. Clair Nelson moved that the expenses of the bibliography project be treated as a capital expenditure and that an amount up to $500.00 be taken out of the reserve fund for that purpose. The motion was seconded by Mr. Kintner and adopted.

8. *Bulletin*

Victor G. Rosenblum, Editor-in-Chief of the Bulletin, reported on future plans. Mr. Kintner observed that Mr. Rosenblum deserved congratulations on the manner in which he is carrying out the Council objectives, to which there was agreement from all other Council members, and the suggestion was made that he keep on going in the same direction. After some discussion of finances, Mr. Teasdale moved that any appropriations of the Section not expended be allocated to Bulletin expenses and credited to the 1959-1960 Bulletin cost. The motion was seconded by Mr. Kintner and adopted.

After discussion as to the price of copies of the Bulletin which go to non-members, Mr. Nelson moved that $4.00 be charged for the current issue of the Bulletin which will contain the proceedings (in summary form) of the Institute on Administrative Problems and that the Editor-in-Chief of the Bulletin and the Chairman of the Budget and Finance Committee be empowered to fix the charge for copies of other issues of the Bulletin. The motion was seconded by Mr. Teasdale and adopted.

9. *Membership*

The following report from headquarters was read:

SECTION OF ADMINISTRATIVE LAW

MEMBERSHIP REPORT

Number of members reported July 15, 1958		1923
Number of new members as of February 12, 1959		150
		2073
Cancellations	118	
Deceased	12	
	130	130
Number of members in Section as of February 12, 1959		1943
Number of members delinquent in payment of dues	74	

Mr. Kintner then spoke on membership plans and stated that Mark Martin, Chairman of the Membership Committee, is moving forward with the membership campaign. Mr. Kintner also reported that he is cooperating with the Junior Bar Conference and their plans for integrating members into Section work. It was the consensus of the Council that the program should be followed and that as many younger members as possible should be brought in. Chairman Gage announced the appointment of Frank Reifsnyder as a Vice-Chairman of the Membership Committee and directed the Secretary to notify Mr. Reifsnyder of his appointment.

10. *Budget and Finance*

Herman Tocker reported on the financial status of the Section and furnished a written report, which is attached to the master copy of these minutes. At the suggestion of Mr. Tocker, Mr. Kintner moved that the Chairman of the Section be given immediate payment of $500.00 to be used by him for expenses incurred up to and including the Annual Meeting. The motion was seconded, carried and adopted unanimously.

Motion was also regularly made, seconded and adopted that all Committee Chairmen should be directed to submit itemized statement of expenses by June 5, 1959, at the latest, and that notice to this effect should be sent to all Committee Chairmen by the Secretary within ample time. It was suggested that committee reports

should be summarized for publication in the Bulletin. This idea was opposed by Mr. Benjamin, but he expressed the thought that reports could be shortened and suggested Committee Chairmen should be advised: (1) that a report should be made and (2) that they should refer to the Section Manual for Committee Chairmen as to type, content and length of report.

February 22, 1959—10:30 A.M.

The meeting of the Council of the Section of Administrative Law reconvened at 10:30 A.M. in the American Room of the Edgewater Beach Hotel.

11. *Regional Meetings*

Charles E. Smoot, Chairman of the Section's Committee on Regional Meetings, reported on plans for the Pittsburgh Regional Meeting, to be held in March. He informed the Council that participants in the December Institute had been invited to participate in the Section's Pittsburgh Regional Meeting and that a number of them had accepted.

Chairman Gage observed that a lot of people know little about administrative law and he feels that by regional meetings missionary work can be done. Earl W. Kintner expressed the view that we should plan for the future and use new ideas rather than a rehash of old programs. Mr. Benjamin expressed the further thought that we should develop regional talent rather than import talent from Washington. Mr. Stephan referred to the Portland Regional Meeting of some years ago and its use of talent from that section of the country. Whitney Harris expressed the view that local people are important as drawing cards and expressed the further view that for the Houston Regional Meeting local committees from the Houston Bar, the local County Bar, and the State Bar Associations of the states covered by the meeting should be set up and given a major part in the planning of the program and that the same thing should be done with the Memphis meeting. Frank C. Newman commented on the importance now being given to continuing legal educational programs.

Earl W. Kintner suggested that Whitney R. Harris could make helpful recommendations for the Houston meeting and further observed that Mark Martin and Charles E. Long, Jr. of Dallas could also make important contributions.

12. *Securities Committee*

Roger Nelson reported on the activities of the Securities Committee generally and referred to H.R. 2480 (86th Cong., 1st Sess.) and the civil penalty proposed therein for failure to file reports with the Securities and Exchange Commission. Whitney Harris then moved that the Council record its opposition in principle to the form of civil penalty proposed by Section 30 of H.R. 2480, 86th Cong., 1st Sess. The motion was seconded by Mr. Teasdale and adopted.

13. *Treasury Department and Customs Bureau Committee*

H. Cecil Kilpatrick, Chairman of this Committee, suggested that consideration be given to a committee on coordination and liaison with other Sections and Committees of the American Bar Association in lieu of his Committee as presently constituted. Chairman Gage expressed the thought that the suggestion was valuable and should be considered by the Council. Mr. Kilpatrick then referred to the National Committee and observed that maybe the National Committee could carry on the functions he has in mind. Raoul Berger expressed his view that the Administrative Law Section cuts across the activities of many committees and Sections of the ABA, including the Standing Committee on Customs Law and the Taxation Section referred to by Mr. Kilpatrick, and that the Customs people in particular need education with respect to the Administrative Procedure Act—believes they are unaware of APA. Harold Russell commented on the Customs Law field and agreed with Mr. Berger that they seem untrammelled by, if not unaware of, the APA, but perhaps they are like some savage Indian tribes—maybe civilization would not aid them. Mr. Kilpatrick said he merely wanted to cooperate, not to abdicate.

Mr. Beelar stated that he gave every ABA Committee and Section a copy of our proposals during his term as Chairman of the Section. Messrs. Kintner and Russell mentioned Council liaison with other Sections and Committees of the Bar Association. Ashley Sellers expressed the view that the Section cannot adopt the principle that disapproval by industry practitioners or other Sections should govern us as a Section.

14. *Agency Rule Making Committee*

Raoul Berger, Chairman of the Committee on Agency Rule Making of the Section, made reference to the Dawson Committee's Survey [4] and said that a hasty examination of it turned up many new phases and that his Committee will make a partial report on the Survey at the Annual Meeting in Miami; that it is a prodigious task to go through and analyze the questionnaires of the many agencies. Frank C. Newman expressed the view that failure of the Section to analyze the Dawson Survey would be very bad. He stated that Appendix VI of the Hoover Commission Report and the Dawson Committee Survey contain most important data and "fairly bristle with violations of the Administrative Procedure Act." He suggested that committees assigned to specific agencies should be given the task of analyzing the response to the questionnaire by that agency. Raoul Berger mentioned the Ford Foundation and suggested that we should ask the Ford Foundation for financial assistance. Professor Newman expressed the view that we can get help if we have good pilot cases to furnish talking points. Mr. Beelar believes our Section should study rule making phases and mentioned the new Senate Subcommittee (Senator Carroll, Chairman) and believes that we can assist by giving staff direction as to objectives, etc. He does not believe this would delay the project but that it should be put in their "hopper." Victor Rosenblum expressed the view that the initial task is analysis but that coordination and consistency are needed so that the fire does not die out and referred to an appointment on the staff of the Dawson Committee for the purpose of correlation of data, etc. He also expressed the hope that the Carroll Subcommittee in the Senate will be directed so as to result in consistency and correlation of Congressional activities. John J. Mitchell expressed his agreement with Mr. Rosenblum and thinks the Ford Foundation aid very desirable. He said that jurisdictional jealousies exist in Congress and suggested that the Section do a study on 10 to 20 agencies and take it to Congress; that Congress will buy a good study, but that leadership must come from this Section. Robert M. Benjamin expressed the view that the Office of Administrative Practice provided for in S. 600 could do a study of this kind and

[4] "Survey and Study of Administrative Organization, Procedure, and Practice in the Federal Agencies by the *Committee on Government Operations*—Agency Response to Questionnaire (December 1957)," House of Representatives.

that good sample studies would be helpful toward getting S. 600 enacted.

Harold Russell, after expressing the view that our problem is how to help Raoul Berger with the task, moved that Mr. Berger be directed to confer with the Chairman of the Section to secure adequate assistance from Section personnel for presentation of pilot studies at Annual Meeting. The motion was seconded by Earl Kintner. Frank Newman moved to amend the motion to direct the Chairman of the Section to formally request of the Chairman of every relevant committee a brief report as to the portion of the Dawson Survey applicable to the scope of his committee, with suggestions. This amendment was accepted by Messrs. Russell and Kintner and the motion, as amended, was adopted.

Mr. Benjamin suggested that E. Blythe Stason and his Standing Committee on Research should be contacted for suggestions. Raoul Berger further explained the scope of the work involved and mentioned Government corporations. Mr. Benjamin expressed the view that Mr. Berger, as a minimum, would have to outline what is to be done in order that there be some coordination. Victor Rosenblum stated that he had access to some student labor at Northwestern and could assign some top graduate students to the work.

15. *Committee on Hearing Examiners*

Fanney N. Litvin, Chairman of the Hearing Examiner Committee, reported generally on the activities of the Hearing Examiner Committee and reported that the major project before the Committee is cooperation and assistance to the Ad Hoc Committee on Federal Administrative Practice Act.

16. *Public Contracts Committee*

Kahl Spriggs, Chairman of the Committee on Public Contracts, reported that the Director of the Budget had asked for a meeting on certain renegotiation matters on February 27. Chairman Gage stated he felt the Section has no views as to the Renegotiation Act itself but is interested in procedural aspects. Mr. Cuneo stated that Public Contracts Committee members lose interest because it takes so long to implement Committee suggestions. Mr. Deale said procedural aspects are important and suggested the possibility of mail vote of the Council on position. Kahl Spriggs mentioned

disputes clause made before the Hebert Committee and Board of Contract Appeals. Mr. Benjamin believes that the matter can wait until the Annual Meeting; said it is a general question.

17. *Junior Bar Liaison*

L. Clair Nelson reported on his activities as liaison with the Junior Bar Conference and mentioned the work of the Junior Bar Committee headed by C. Frank Reifsnyder. He referred to a report made to the Junior Bar Conference on yesterday, "Practical Aids to the General Practitioner," and said that a suggestion that a new Section of the American Bar Association on general practice be established excited great interest; that the young people are restless and the ABA must come up with a program to interest them; and that Frank Reifsnyder and his Committee have given our Section an inside track to their interest. Chairman Gage stated that we realize the importance to the Section of interesting the young people and believes that, if the fact is brought home to the Junior Bar Conference that the field of administrative law is "an expanding frontier" and that a large percentage of their practice will be in such field, they will join our Section and work with us. Mr. Nelson commented on the Newman bibliography project and believes that it will illustrate to the Junior Bar the importance of such matters and will help interest them.

18. *Organization and By-laws Committee*

Charles E. Smoot, a member of the Committee, reported in the absence of the Chairman that the Committee has held one meeting and has given some thought as to how best to assure continuity of action in the Section. Chairman Gage said that one who has not been Chairman of the Section cannot realize the great task involved; that he still does not have all committees set up in their entirety; and that the time lag is to be deplored. The Secretary of the Section suggested that the By-laws Committee give consideration to provision for a Chairman-elect of the Section and also for the election of an alternate Delegate. The Chairman asked Mr. Smoot to relay these suggestions to the Chairman of the Committee on Organization and By-laws.

19. *National Committee*

Valentine B. Deale, Vice-Chairman of the National Committee, in the absence of the Chairman, Bernard J. Gallagher, stated that he had been asked to make no report for the Committee. Chairman Gage expressed the view that new legislation should be considered promptly and that Chisman Hanes kept in touch with it last year. He is aware that Donald Channell represents the ABA in keeping in touch with legislation generally but feels our Section must also keep in touch with legislation affecting our Section. Mr. Deale expressed the view that the volume of bills for Section consideration is cut down by the Legal Services and Procedures Committee of the ABA, chairmaned by Charles A. Horsky, and the Ad Hoc Committees in Charge of specific legislative proposals.

20. *Judicial Review of Administrative Agency Decisions*

Mr. Beelar mentioned his activity as liaison from the Section of Administrative Law to the Section of Judicial Administration and mentioned specifically the project with George Washington University Law School relative to judicial review of administrative agency decisions. Charles E. Long, Jr. reported that Mr. Lynham, Chairman of a committee of the Judicial Administration Section dealing with the problem, will ask for funds to implement the project. Raoul Berger stated that he thought it should be known that the genesis of the idea was Mr. Beelar's and that he should be applauded for it.

Harold L. Russell moved that the Section of Administrative Law endorse and support the project and offer our assistance in its implementation. The motion was seconded by L. Clair Nelson and adopted.

21. *Rule Making Proceedings*

Donald C. Beelar expressed his regrets about the haste with which the Council was forced to act on the code matter on Saturday and asked that consideration be given to the desirability of having the Council meet 30 days ahead of the Annual and Midyear Meetings to afford time for deliberate consideration of matters before it. He also stated that he is aware that there is room for language improvements in the code as drafted and the need for time for discussion of views as to the extent to which a code

of conduct should apply to rule making proceedings. He suggested that a committee prepare recommendations for code of conduct applicable to rule making proceedings for presentation at Miami Beach.

Later in the morning, Whitney Harris moved that the Beelar suggestion as to consideration of application of code of conduct to rule making proceedings be adopted and that the Chairman of the Section appoint a committee or refer the matter to an established committee for implementation. The motion was seconded by Mr. Stephan, who referred to Judge Peck's Committee and said that Committee might be asked to consider rule making. Mr. Denning stated that he regards the Postal Department as the most flagrant violator of the Administrative Procedure Act—that unless a Court has ordered them to comply with APA, they do not do so; and that the Department has little, if any, rule making "processes"—what they have, can hardly be called rule making procedures. He expressed the view that the Postal Matters Committee, now under the chairmanship of Roy C. Frank, may be able to call the attention of the proper persons to some of these problems.

Whitney Harris moved as a substitute for his own motion that the subject matter of the resolution adopted by the Council and transmitted to the Board of Governors and the House of Delegates on yesterday relative to adjudication be referred to the relevant established committees of the Section for consideration of the extension of the principles therein enunciated to matters other than adjudication. The substitute motion was seconded by Mr. Stephan and Mr. Russell and adopted.

Mr. Russell expressed the view that there is no sense in giving the matter back to the Peck Committee; that there were about 18 bills last session and there are several bills already this session which relate to rule making; that the Harris bill (H.R. 4800) would cover more than the Peck Committee draft; and that he feels "the ABA missed the train again." Mr. Gage observed that the affirmative implies the negative as to rule making as the law stands at present. Mr. Benjamin again mentioned the amendment of the Atlanta resolution by the insertion of the word "adjudicative" before its adoption by the House of Delegates. He also mentioned the change in the definition of rule making contained in S. 1070 (new Proposed Code of Administrative Procedure) and said that, if passed, it will make rate making adjudication. Mr.

Denning questioned Mr. Benjamin about the rate making definition and said that he wants the fixing of rates to be based on a record.

Chairman Gage reminded that positions taken by the Section and its committees must be cleared by the House of Delegates or the Board of Governors. He also expressed appreciation for the cooperation he had received and asked for comments, both favorable and unfavorable, on the work of the Section—he does not object to kibitzers.

The meeting adjourned at 3 P.M.

ELIZABETH C. SMITH, *Secretary*